87-264

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

No. _____

ROBERT J. SOLIS,
CARMELA DELGADO, DIANE Y. JOHNSON
RICHARD J. OSONNA, BEN BURNETT,
MARTHA A. MUNOZ, GERHARD H. SCHULZ,
WILLIAM X. CHOY, JAMES BOYETTE,
DON GARCIA, REGALADO P. DANIEL,
DAVID A.R. ROBERTS IV, AND
MIGUEL MORENO, on behalf of
themselves and all others similarly
situated,

Petitioners

-v-

BAY AREA RAPID TRANSIT DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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Attorney for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Can a local governmental agency lock out its union employees during a labor dispute, and if so, under what circumstances, and pursuant to what underlying motivation of the governmental employer is such a lockout legal and not violative of said public employees' due process and freedom of association rights under 42 U.S.C. Section 1983?

2. Do the same criteria apply in determining the legality of a *public* employer's locking out its employees as apply in determining the legality of a *private* employer's locking out its employees?

3. Did the First District Court of Appeal of the State of California err in holding that BART did not violate the constitutional right of freedom of association in refusing to permit union members against whom there were no pending disciplinary charges the opportunity to work for approximately three months, while permitting non-union members to work, even though there was work available for the aforesaid union members—said refusal resting solely upon said union members' membership in UPE 390 or ATU 1555 rather than on any charge of their participating in any alleged misconduct?

4. Can a person be penalized in his employment, and deprived of his livelihood for almost three months, because of speculation and fear by a governmental employer that a union of which he is a member will ask him to do certain illegal acts in the future and that, in response, he will accede to the union's request to do such illegal acts, even though he has not participated in any illegal acts in the past and even though he has no specific intent to further any allegedly unlawful aims of the union?

5. Can a person be penalized and deprived of his livelihood by his governmental employer solely because of his membership in a union, and if so under what circumstances?

6. Is penalization of a governmental employee by refusing to permit him to work for three months, based on the sole criterion of his being a member of a specified union, a sufficiently severe penalty for said employee's exercise of his freedom of association rights to permit him to maintain a cause of action for damages under 42 U.S.C. Section 1983, or is a more severe penalty such as permanent termination necessary before he has a cause of action under 42 U.S.C. Section 1983?

PARTIES TO THE PROCEEDING

The named plaintiffs to this class action proceeding were: Robert J. Solis, Carmela Delgado, Diane Y. Johnson, Richard J. Osonna, Ben Burnett, Martha A. Munoz, Gerhard H. Schulz, William X. Choy, James Boyette, Don Garcia, Regalado P. Daniel, David A. R. Roberts IV, and Miguel Moreno. Said parties represented the class, which was comprised of all employees of Bay Area Rapid Transit District who were either members of United Public Employees Local 390 of the Service Employees International Union, or of Local 1555 of the Amalgamated Transit Union, during the period August 31, 1979 to November 23, 1979.

The named defendants to this class action proceeding were Bay Area Rapid Transit District (BART) and its General Manager, Keith Bernard. Defendant Bernard was dismissed from the proceeding as a named defendant prior to judgment.

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Petitioners (the named plaintiffs and the certified class they represent in the action below) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the First Appellate District, Division Two, filed February 20, 1987, with rehearing denied on March 19, 1987, and petition for review to the California Supreme Court denied on May 13, 1987.

OPINION BELOW

The unpubished opinion of the Court of Appeal of the State of California (dated February 20, 1987), the trial court opinion it reviewed (first filed on December 27, 1983, as an announcement of intended decision, and revised by the penned in, initialed crossing out of eight words on page 4 thereof on February 15, 1984), the trial court judgment it reviewed (filed on February 22, 1984), the order denying petition for rehearing by the Court of Appeal (dated March 19, 1987), and the order denying petition for review by the California Supreme Court (dated May 13, 1987) are attached as Appendices hereto.

JURISDICTION

The opinion of the State Court of Appeal was issued on February 20, 1987. A timely petition for rehearing was denied on March 19, 1987. A timely petition for review to the California Supreme Court was denied on May 13, 1987. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). A state court of last resort has decided a federal question—plaintiffs' claim for relief under 42 U.S.C. Section 1983—in a way in conflict with the decisions of a number of federal courts of appeals. Furthermore, a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, and has also decided a federal question in a way in conflict with the applicable decisions of this Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions involved are 42 U.S.C. Section 1983, and the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

In the case at bar, a class action tried by the Superior Court in and for the City and County of San Francisco, State of California without a jury, approximately 2,000 employees, part of whom were members of Local 390 of the Service Employees International Union (SEIU 390) and the other part of whom were members of Local 1555 of the Amalgamated Transit Union International (ATU 1555), sought wages for the period of time between September 1, 1979 and November 23, 1979. The trial court certified the class, and found that said employees were locked out by defendant Bay Area Rapid Transit District (hereinafter referred to as "BART") during said period of time, and were not permitted to work on the sole criterion that they were members of one of the two unions. During said period of time, all employees of BART other than the members of these two unions were permitted to work.

For part of the lockout period, BART provided no passenger service, and for part of the lockout period, BART provided limited passenger service. Temporary and management personnel substituted for the locked out employees during the entire period of time. Many of the locked out employees had jobs for which there was work available regardless of the extent of passenger service going on. For example, gardeners, accountants, secretaries, mechanics, clerks, and maintenance people were not permitted to work during the entire period if they were members of either of the two unions, even though there was plenty of work available for them to do. Employees of BART who were not members of either of the two unions, such as police (whose duties dealt with passenger problems), foreworkers, and certain engineers, might have had no work to do during at least part of the lockout period (the part of the lockout period in which there was no passenger service) but nonetheless they were permitted to come to work and draw their paycheck.

BART management conceded the "vast number" of the locked out employees were innocent of any suspected wrongdoing, but nonetheless they were not permitted to work solely on the criterion they were members of one of the two unions.

The union contracts had expired on June 30, 1979. BART con-

tended that certain members of the two unions had engaged in certain disruptive tactics after said period of time, the latest of which was a sick-in by certain train operators on August 31, 1979. Rather than mete out individual punishments to the individual wrongdoers, they locked out all members of both unions at 7 p.m. on August 31, 1979, without meeting and conferring with, or notifying, the unions beforehand, of their proposed action.

The plaintiffs contended that BART had violated their rights under 42 U.S.C. Section 1983 (specifically, their freedom of association rights—they were penalized solely on the criterion of their being members of either of the two unions) and further contended that BART had committed a violation of State law. Plaintiffs are petitioning the United States Supreme Court herein for review of the State Court of Appeal's ruling on the 42 U.S.C. Section 1983 cause of action. There was never any dispute in the proceedings below that plaintiffs had raised the 42 U.S.C. Section 1983 cause of action in a proper and timely manner, and the State Court of Appeal addressed said cause of action on its merits in Section I of its opinion.

The trial court, while conceding that many of the employees were innocent of any alleged wrongdoing (BART conceded at trial that the vast number were innocent of any alleged wrongdoing, and the evidence confirmed that fact), and while conceding that said employees "were at all times willing to faithfully perform their duties", nonetheless held that BART was justified in its actions because "it was not in a position to make an individual assessment of which employees would be loyal in the future" and which ones would not. (CT 134:15 - 135:2.)

The trial court also noted that the "evidence does suggest...that there may have been a strong desire on the part of BART to affect the outcome of the stalled negotiations. Thus, aside from the desire to protect its business from loss, the purpose of the lockout may well have been to bring pressure on the unions to modify their demands, which eventually they did." The trial court, however, relying on *American Ship Building Co. v. N.L.R.B.* (1965) 380 U.S. 300, held that such an economic motivation to put pressure on the unions was a perfectly legitimate justification for a

lockout of employees, and lengthy deprivation of their livelihoods, by a governmental employer. (CT 135:20-136:7.)

The Court of Appeal affirmed the trial court's opinion. It conceded that a "troubling" question was presented as to the propriety of BART's refusal to allow to work those union members against whom there were no pending disciplinary charges (the vast majority), and conceded that it was "troubling" that "such refusal rested solely upon their membership in UPE 390 or ATU 1555". However, the Court of Appeal took the position that such severe penalization of said members, and deprivation of their livelihoods, based on their union membership alone was justified. The Court based said justification on its (the Court's) speculation that the unions would in the future have imposed unlawful demands on the members, and that the members at said time would have been likely to have acceded to these unlawful demands and in so doing would have adversely affected the efficient operation of BART. (CA:Section I.)

The Court of Appeal also took the position that the lockout was justified because "the potential hazards to the public outweighed the injury suffered by the members of the unions for the period of the lockout." (CA:Section I.) The "potential hazards to the public" referred to were the possibility that passengers would be stranded or endangered while traveling. It omitted any mention from its analysis of the fact that even after the system was shut down for passengers, there was work to be done by most of the union members who were locked out—secretarial, custodial, gardening, clerical, etc.—and that there was no potential hazard to passengers from such non-passenger related work. Nonetheless, the employees were not permitted to work during the entire lockout period solely based on the criterion of their union membership.

One of the biggest problems with the Court of Appeal's decision was its failure to distinguish between the decision to shut down passenger service, and the separate, independent decision to lock out and lay off all members of the two unions while permitting all other employees to continue to work and draw paychecks. The Court of Appeal's opinion treated the two separate decisions as if they were one, when in fact they were two independent decisions requiring separate analysis.

It should also be noted that the Court of Appeal glossed over the trial court's conclusion that the lockout was also probably motivated in significant part by BART's desire to gain economic bargaining power over the unions in the negotiations—a motivation having nothing to do with concerns about potential hazards to passengers.

B. THE REASONS THE SUPREME COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI

The Supreme Court should grant this petition for writ of certiorari, in order to settle important federal questions of law applicable to labor disputes between public employers and their employees. Specifically, the Court should address the issue of under what circumstances, if any, a lockout by a public employer of its union employees (based on their union status) in a labor dispute does not infringe upon said employees' freedom of association rights and does not constitute arbitrary governmental action.

The Supreme Court addressed the issue of criteria to be used in determining the legality of a lockout by *private* employers in *American Ship Building Co. v. N.L.R.B.* (1965) 380 U.S. 300, but has never addressed the criteria to be used in determining the legality of a lockout in the *public* sector. As hinted at by the Supreme Court in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 226 fn. 3, 227, 230-231, public employers face certain constitutional constraints on their conduct (based on First Amendment freedom of speech and freedom of association questions) which private employers do not face. Given the huge numbers of employees employed by state and local governmental agencies who are unionized, the severe economic hardship faced by employees and their families in a lockout, and the strong interest the public has in government's providing continued services during a labor dispute, the Supreme Court's addressing the issue of lockouts in the public sector, an issue it has never addressed (and regarding which there appears to be no published case law) is both timely and important.

The case also raises important questions applicable in a more general manner to important Constitutional freedom of associ-

ation issues, and the extent to which one can be penalized in one's job and livelihood for being a member of a specified association which is deemed as being engaged in potentially detrimental activity. The Supreme Court has consistently taken the position that mere knowing membership in an organization without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion of a person from working at a job. (See, e.g., *United States v. Robel* (1967) 389 U.S. 258; *Elfbrandt v. Russell* (1966) 384 U.S. 11; *In Re Stolar* (1971) 401 U.S. 29, 30; *Keyishian v. Board of Regents* (1967) 385 U.S. 590.) The State Court of Appeal's decision is in conflict with this line of Supreme Court cases. In the instant case, the sole criterion used to determine whether to deprive approximately 2,000 employees of their jobs and livelihood for three months was their membership in either of the two unions, without any inquiry into whether these employees had the specific intent to further any unlawful aims either of the two unions allegedly had decided to advocate or might have decided to advocate at some future point in time.

The State Court of Appeal's opinion, as did the trial court's opinion, also raised the question of whether the temporary deprivation of employment (of approximately three months), as opposed to a permanent deprivation of employment, was a severe enough penalty to be considered an unconstitutional penalization of freedom of association. The Supreme Court should use this opportunity to clarify what constitutes a severe enough penalty of freedom of association in a job situation to create liability under 42 U.S.C. Section 1983, and make clear that its ruling in *Perry v. Sindermann* (1972) 408 U.S. 593, 597, applies to temporary deprivation of employment, as well as permanent deprivation of employment, coming about because of exercise of First Amendment rights.

C. MATERIAL FACTS

A correct statement of the underlying facts in this case, supported by reference to the record, follows hereinafter:

BACKGROUND TO LABOR DISPUTE

The 1976-1979 BART collective bargaining agreements with SEIU 390 and ATU 1555 expired on June 30, 1979; however, prior to the expiration date, BART and the unions engaged in negotiations which resulted in resolution of most of the issues. (Ex. 21; Ex. P.) By June 30, 1979, the big issue yet unresolved was the cost of living allowance (COLA). (RT 10/19, 276:3-7.) In the first week of July, negotiations continued, and the workers continued working on a day-to-day basis under the terms of the expired collective bargaining agreement. (RT 10/17, 26:16 - 27:5.)

On July 8, 1979, BART offered the negotiating team of the two unions what it called its "final" offer. Under the terms of this "final" offer, COLA was not entirely eliminated, but it was drastically modified, such that considering the rate of inflation at the time, the workers would be suffering a sharp reduction in real wages if they accepted the proposal. (Ex. 3; Ex. T.)

Both unions voted to reject this offer. (RT 10/19, 244:16-18; 10/21, 540:4-15.)

THE CAR COUNT ISSUE

In June and July 1979, a problem had been developing with "car count". Although there were enough train cars to provide acceptable service to customers on any given day, the number of cars available for active service was gradually diminishing. (Ex. A, Ex. C.) BART management expressed concern that certain maintenance workers might be doing repairs at an unduly slow pace, thus causing a drop in "production" and accordingly a drop in the car count. Mr. Maher, chairman of SEIU 390 testified that the union's members were consulting maintenance manuals prior to doing work, not with the purpose of slowing down work, but rather because there was a real concern among the unions that management would be looking for anything going wrong pertaining to the maintenance of the cars, and "[s]o we advised our members to take extra precautions and go by the manuals if necessary." (RT 10/21, 593:1-8).

After the unions (with BART management's blessing) formed a car count committee, the car count situation started to stabilize. (RT 10/18-19, 139:2 - 140:22; Ex. 7).

On July 20, 1979, BART managment notified the unions it was withdrawing its recognition of the car count committee, and that the members of the committee would no longer be permitted time off from work to meet with union members or management to address the car count problem. (Ex. U.)

Despite BART management's position that the car count committee had not done any good, BART management, on July 26, 1979, issued a press release in which Keith Bernard, General Manager of BART, was quoted as saying that the production rate in the shops had returned to normal, and that the car count had stabilized somewhere over 200 cars per day for service. (Ex. 7).

The press release did, however, express concern that a "refusal" of SEIU 390 maintenance personnel to work overtime was hindering an effort to deal with the backlog of cars needing maintenance—that even though production was normal and the car count had stabilized, an effort to increase the car count back to its pre-June level still needed to be worked upon. (Ex. 7.)

It should be noted that under the terms of the expired collective bargaining agreements, overtime was not mandatory, and a "refusal" by a maintenance worker to work overtime was perfectly acceptable. (Ex. 21, Ex. P; RT 10/20, 400:15 - 401:20; 10/21, 563:4-24.) Furthermore, there is no showing that there was any less overtime being worked in July 1979 than in previous years. (Ex. 14; RT 10/17, 83-85.)

THE JULY CONCORD YARD DISPUTE

Despite the fact that production was back to normal and the car count problem had stabilized, BART, on July 27, 1979, informed Paul Varacalli, the Executive Director of SEIU 390, that effective July 30, 1979, BART was going to transfer all the maintenance workers in the Concord Yard to the Hayward Yard and Richmond Yard, and put in management and engineering personnel in the Concord Yard to try to "perform the necessary maintenance and inspection work to accelerate solution of the car availability problem." (Ex. 8).

In response, Paul Varacalli (Executive Director of SEIU Local

390), John Maher (SEIU Local 390's chapter chairperson), Jim Danzy (president of ATU 1555), and some 50 members of Local 390 employed by BART staged a sit-in at the Concord shop facility on July 30, 1979.

Superior Court Judge Robert Cooney granted injunctive relief requiring BART to bring back the transferred workers and requiring it to stay the imposition of any discipline upon the approximately 50 union members involved in the sit-in pending the outcome of arbitration proceedings. (Ultimately in September 1979, after the lockout complained of in the complaint herein had happened, the Court of Appeal vacated both the paragraph of Judge Cooney's order requiring BART to bring back the transferred workers and the paragraph of his order staying imposition of discipline upon the individual participating union members. *San Francisco Bay Area Rapid Transit District v. Superior Court* [1979] 97 Cal.App.3d 153.)

BART'S UNILATERAL CHANGES IN THE TERMS OF EMPLOYMENT

Meanwhile, on or about July 18, 1979, BART had unilaterally rescinded the grievance procedure set up by the 1976-1979 collective bargaining agreement, along with certain other terms contained therein. These changes were instituted without prior consultation or bargaining with the unions, and without prior notice to, or opportunity for input by, the unions. (Ex. 5, Ex. 28, Ex. 30; RT v. 4, 60:1-4.)

Then, on or about August 20, 1979, BART issued a document entitled "Terms and Conditions of Employment", which set forth in specifics various inilateral changes it was making in the expired collective bargaining agreement. These changes also were instituted without prior consultation or bargaining with the unions, and without prior notice to, opportunity for input by, the unions. (Ex. 13, Ex. P, Ex. 21; RT 10/17, 69:25 - 71:14; 10/19, 277:8-17.)

The unilateral changes in terms and conditions of employment instituted by BART included the following: a) the grievance procedure no longer had any provision in it for an arbitrator or other neutral party making the final decision on a grievance; rather, the BART supervisor now made the final unappealable decision regarding any employee grievance; (b) the COLA was abolished;

(c) overtime was made mandatory; (d) sick leave was eliminated for the first three days of any absence. (Ex. 13, Ex. P, Ex. 21.)

Pursuant to the new unilateral terms promulgated by BART, numerous maintenance employees were asked to work mandatory overtime, often with little or no advance notice. Unlike under the old terms, they could not refuse a request for mandatory overtime without facing discipline, and under the new grievance system, they basically had no effective method of protesting suspension or termination. (RT 399-429; 10/21, 562:18 - 563:24.)

With the new unilaterally-imposed grievance system in effect, management started handing out short-term suspensions on an almost willy-nilly basis for a variety of matters, including refusal to work overtime, with helpless employees having no effective means of redress, regardless of the merits of the management action. By August 29, management had handed out approximately 345 suspensions in the month of August, about 20% of the total work force at BART. Almost 40% of the maintenance work force had received suspensions in August. Most of the suspensions were for between 3 to 5 days. 165 of the suspensions were for refusal to work mandatory overtime, and 121 were for attending a union meeting. (Ex. 15, 16, 17; RT 10/17, 95:18 - 104:7.)

Thus, even while BART management was complaining about the car count figures, it was summarily suspending numerous workers and cutting down on the number of man and woman hours available to work on ameliorating the car count situation.

THE AUGUST 27, 1979 UNION BULLETIN

The appellate opinion totally misstates the contents of a joint union bulletin of August 27, 1979 (Ex. 31), a bulletin which addressed certain comments to, among other issues, BART management's unilateral change in the terms of employment regarding overtime. The union bulletin did *not* instruct union members to refuse to work overtime, nor did it threaten any disciplinary proceedings against employees who chose to work overtime. It stated simply—and the words of the bulletin speak for themselves—that it was the unions' "position" that "no one should work overtime under these stressful conditions," referring to the fact that the District was threatening to give three-day suspensions to anyone refusing to work overtime. The unions were

attempting to get management to back down from a harsh, inflexible, totally inhumane rule, which made no allowance for very legitimate commitments certain workers might have which would preclude them from working mandatory overtime on a given day. Unlike the appellate opinion totally misstates, there was no threat made by the unions to discipline workers who chose to work overtime.

THE AIR BAG INCIDENT

On the morning of August 28, 1979, BART discovered that a number of airbags had been slashed at the Concord yard on certain inactive trains awaiting maintenance work. (Ex. 32.) Airbags are used to make sure the height of the floor of the train is the same as that of the platform when the train stops, so that a passenger will not have to change levels in stepping out of the train onto the platform or vice versa. They have nothing to do with the safety of the actual operation of the train. If there is no airbag, a passenger would have to step up or down in exiting a train onto the passenger platform, and vice versa. (RT 10/17, 90:10-23).

On August 29, 1979, BART suspended all SEIU 390 employees working in the Concord yard "pending the District's investigation of acts of vandalism on District transit vehicles." (Ex. 32.) BART management did not, however, request any outside police help in the investigation, nor did it ask any union help in conducting the investigation, although the unions deplored the incident and were ready and willing to help investigate. No culprit was ever accused, nor was any person ever identified as a possible suspect, and further, there was no proof ever put forward that it was any more likely that it was a union employee that did the act than that it was a managerial employee (or for that matter an unauthorized interloper). (RT 10/17, 87:10 - 88:23; 10/18, 147:19 - 148:16; 10/21, 564:15-27, 574:7-16, 690:27 - 610:5.)

Management and engineering personnel were moved into the Concord yard to take over the maintenance duties of the SEIU 390 union personnel. BART did not notify the unions ahead of time of its decision in this matter, did not seek the unions' input on the matter, did not meet and confer with the unions on the

matter, nor did it bargain with the unions on the matter. (RT 10/17, 88:2 - 89:4; Ex. 32; RT 10/18, 92:1 - 95:2; 10/21 573:18 - 574:6.)

THE SAFETY ISSUE

ATU 1555 expressed a concern to management that a safety problem for the train operators and the public had been created, because many of the management and engineering personnel taking over maintenance in the Concord yard might not have (or might no longer have) the required practical day-to-day skills to maintain the trains safely and properly. The union requested that an outside person from either the State Public Utilities Commission, CAL OSHA, or the Rohr Corporation (which had made the cars), be permitted to come in and inspect the trains coming out of the Concord shop to make sure the work was being done pursuant to applicable safety standards. Management refused to bargain, or even meet and confer, on this issue. (RT 10/19, 251:12 - 252:21; RT v. 4, 91:1 - 92:15; RT v. 6, 306:27 - 307:23.) The safety concern of ATU 1555 was exacerbated even further on the morning of August 31, 1979, when a train leaving the Concord yard started smoking. (RT 10/19, 253:14-25; 10/18, 144:22 - 116:2.)

AUGUST 31: THE SICK-IN

As a result of management's refusal to even meet and confer on the safety issue, a sick-in by train operators running from the Concord yard and to the Concord yard took place on August 31, 1979. (RT 252:25 - 254:26.) Most of the train operators who were either dispatched from or to the Concord yard dropped sick. None of the train operators on other lines dropped sick. (RT 10/19, 257:15-28.)

BART did not call all of the train operators who were off duty at the time, some of whom testified they would have run a train on the Concord line, if they had been requested to do so. (RT v. 6, 312:15 - 313:10; RT 10/19, 358:11 - 359:19; 10/18, 332:6 - 334:2; 10/21, 495:1 - 498:17; 10/18, 149:5-11.) Additionally, even though many train operators dropped sick, some personnel did run trains to or from Concord on August 31, 1979. (RT v. 5, 149:13; RT 10/18, 220:22 - 222:2.) Further, some of the people who dropped sick

had well-documented, obviously legitimate excuses. (RT v. 6, 308:9-21; 390:4-12; 311:12-24.)

The total number of train operators who dropped sick either before reporting to duty on August 31, 1979 or during the day after reporting to duty appears to most likely to have been in the neighborhood of 50, with some of those dropping sick after already putting in an 8-hour day. (See Exhibits M and N.) Defendant, in its respondent's brief filed in the State Court of Appeal, at p. 9, indicated that the number of drop-sicks was "in excess of thirty-five". At least one of the drop-sicks worked an hour of overtime after putting in his regular 8-hour day before becoming ill. (Exhibit N).

AUGUST 31: BART'S AGGRAVATION OF THE PROBLEM

BART management did not meet and confer with the leadership of either of the two unions over the problem that had developed, but instead unilaterally started diverting operators who were not assigned to the Concord line to work the Concord line, in direct violation of the terms and conditions of their employment and without any prior notice to them. (RT 10/19, 257:8-12; 257:25 - 259:13; 251:10 - 252:13; RT v. 6, 400:12 - 401:13; v. 5, 221:10-14; v. 6, 313:11-21; RT 10/20, 392:24 - 394:18; 10/18, 218:2 - 220:2.) BART management knew that the effect of continuing to divert operators to the Concord line, instead of meeting and conferring with the union about the situation, would mean that more and more operators would drop sick, and indeed hoped that the expected result of said course of action would justify a shutdown of the system in its entirety on the excuse there were not enough train operators to run it. (RT 10/20, 392:24 - 394:18.)

The Concord Line (C line) was the only line affected by the sick-in, and it comprises only 12% to 13% of the BART system in terms of passenger patronage. It runs from Rockridge station to Concord station. (Ex. 36.) There were no problems with sick-ins on any other part of the BART system on August 31, 1979. Furthermore, there was no reason why the passengers who normally would use the Concord line could not ride to the MacArthur station from San Francisco on BART and then be bussed the rest of the way to Concord (or vice versa). Indeed, buses were char-

tered by BART to run between MacArthur station and points on the Concord line that day, as well as in the ensuing shutdown period. (RT v. 4, 135:2-19; v. 4, 93:12-28; v. 5, 271:10-24.)

AUGUST 31: THE LOCKOUT

At or about 2 p.m. on August 31, 1979, Keith Bernard, the General Manager of BART, made the decision to shut down the BART system in its entirety at 7:00 p.m., after the evening commute. (RT v. 6, 335:12-18; 448:4-8; v. 4, 86:3-13; Ex. 33.) He also made the decision that all members of both SEIU 390 and ATU 1555 would be indefinitely laid off and not thereafter be permitted to work, although all other BART employees would be permitted to work. He made this decision without bargaining with, or even contacting, either of the two unions; without getting any input from them; and without even notifying them ahead of time of his decision. Nor did he give any consideration or study to the possibility of running truncated service, such as by cutting off the 13% of the system representing the Concord to MacArthur route, as an alternative to shutting down the system in its entirety. (RT v. 6, 336:5-10.)

BART's press release on the matter (Ex. 33) claimed that a "strike" by BART employees had forced the "shutdown" of the BART system. It stated that "the concerns for public safety, coupled with today's action of train operators walking off the job, has brought BART to the regrettable conclusion it is unable to provide effective service." The press release also stated there was a negative financial impact of continuing a "low level" of service. (Ex. 33).

Evidence was introduced at trial showing the daily number of BART passengers remained high up through the day of the shutdown. Thus, BART was not hurting for passenger revenue, and a decline in passenger revenue could not justify a "shutdown". (Ex. 40.)

Furthermore, consumer complaints in the summer of the labor dispute about service were fewer than the previous summer (when there had been no labor dispute). (Ex. 41, Ex. 42.)

Additionally, vandalism in the fiscal year of the 1979 labor dispute was considerably less than in the following fiscal year when there was no labor dispute. (Ex. 1, Ex. 2.) Significantly, no BART

employee was ever accused or identified as even being a possible suspect in any vandalism incident in the summer of 1979. (RT 10/21, 564:11 - 565:5; Ex. 45; RT 10/17, 87:24-26.)

The only incidents of any alleged "slowdown" or "strike" activity in the summer of 1979 were: (a) the train operators dropping sick on August 31, 1979; (b) approximately 21 station agents dropping sick *after* the decision to shut down the system on August 31, 1979 had already been made (Ex. E; RT 10/21, 625:22-25); (c) a very brief unauthorized sitdown by 7 to 10 clerical workers in July, which was successfully ordered halted by union officials immediately after they learned it was going on (RT v. 5, 211:18 - 212:19; 185:13 - 186:12; v. 6, 450:2-14, 254:22-28); and (d) the car count problem, which management itself attributed more to a failure by employees to work overtime than to any deliberate slowdown by the employees. (Ex. 7.) (Additionally, BART claimed that the system was shut down for 15 minutes on July 11, allegedly because certain emergency vehicle operators went to a union meeting to vote on BART's "final" offer. BART's claim was disputed at trial, an EVO testifying that in fact the operators had remained on their posts. [RT 10/19, 294:21 - 298:1]. The trial court did not make any finding that the EVO's had been absent from their posts.)

Neither union had taken the required steps to call for a strike, and indeed each union had repeatedly admonished its members not to engage in sabotage, not to engage in any provocative acts, not to engage in any slowdown or walkout, and to continue to do their work in an efficient manner. (RT 10/19, 278:17-27; 10/21, 564:11 - 565:5: 566:25 - 567:7; 568:1-20; Ex. 31; RT v. 5, 168:22 - 172:17; 177:11-12; RT 10/18, 140:27 - 141:10; Ex. 44, Ex. 45, Ex. 34.) All summer long, the unions had continued to bargain in good faith, showed flexibility in their positions, and had indicated to BART they were amenable to mediation or arbitration of any disputed matters. BART, in reply, had repeatedly rejected arbitration or any meaningful mediation, and had tenaciously stood firm on its basic COLA position, although indicating it would be amenable to repackaging the COLA position if the total cost were the same. (RT v. 5, 166:6 - 167:11; 165:12-19; 163:3 - 165:2; RT 10/18, 105:13-25.)

A review of the transcript of an August 29, 1979 press confer-

ence (Ex. K) by Paul Varacalli, Executive Director of SEIU 390, reveals that BART apparently deliberately misquoted him in its August 31 press release (Ex. 33) announcing the shutdown of the BART system. Varacalli had stated in his August 29 press conference that the union had, in effect, been on "strike" for two months, and had been engaging in "guerilla warfare activity", and that this had been making a "mess of the transit system." He also stated that BART had been "overreactive". (EX. K.) He did *not* state that "this has posed grave concerns about the status of the transit vehicles and wayside equipment," as BART claimed in its press release.

Several things are clear about what Varacalli said at the press conference on August 29, 1979.

First, BART did not lock out and lay off all members of SEIU 390, and all members of ATU 1555 (of which Paul Varacalli was not a member or representative, and which is the larger of the two unions) at the end of the day of August 31, 1979, because of what Paul Varacalli said in the heat of the moment at a press conference on August 29, 1979 (two days earlier), nor did BART claim it did.

At trial, Varacalli testified that what he meant by the term "guerilla warfare" at his August 29 press conference was that both BART and his union (SEIU 390) were taking "potshots" at each other, and that BART management had been trying to get the union to go out on strike for months. Varacalli further testified that no member of SEIU 390 had gone out on strike against BART, that a strike had not even been authorized by the union membership, and that there was a lot of verbal posturing going on by both sides. (RT v. 5, 177:11 - 180:9; 175:1 - 176:19.) Varacalli and the other SEIU 390 officials had repeatedly admonished union members throughout the course of the labor dispute not to engage in any provocative act, not to engage in any vandalism or violence or sabotage, and to do their work in a productive, efficient manner. (RT 10/21, 559:25 - 560:1; 564:11 - 565:5; 565:25 - 567:7; 568:1-20; Ex. 31; RT 10/21, 576:10 - 578:4; 609:1-26; RT v. 5, 168:22 - 172:17; Ex. 34.) Indeed, as noted, there was no evidence introduced at trial identifying any member of either union as having committed any act of vandalism or violence or sabotage.

It is also clear that Varacalli, by his remarks, did not mean that

a strike was already in effect (not only because no one was on strike and because a strike had not been called, but because he clearly stated in his remarks that the union [SEIU 390] wanted to reserve the right to determine when a strike would occur). It is also clear by his remark that BART had been "overreactive" that he did not believe the union or any of its members had, in actuality, done anything of a very provocative nature.

Very significantly, the appellate opinion failed to reflect there was a 7 1/2 second audio gap in the tape of the August 29 press conference (Ex. K), where the video showed Varacalli speaking but the audio did not come out—a gap which could have totally distorted his remarks.

With regard to the car count situation on August 31, 1979, William Fleisher, Director of Field Services and head of train operations for BART, testified that he only needed 90 cars to run the BART system at an acceptable level of service. (RT v. 4, 134:19-25.) Ninety cars would work out to 9 trains at 10 cars apiece or a few more trains if there were fewer cars in each one. Trains could be run under such conditions at 30 minute headways.

In this regard at the close of the day on August 31, 1979, there were 13 trains in operation. (Ex. I.) Further, there were approximately 170 cars available for service plus 61 other cars that could have been made available if needed, because they were out of service for preventative maintenance check only. (RT 10/20, 443:11-20; Ex. 39; Ex. A.) Both Mr. Fleisher and Mr. Bernard testified that the car count problem was not responsible for the shutting down of the system. (RT 129:9-14; v. 6, 337:6-8.)

After the shutdown of the system, all union employees were escorted from the BART premises, in many cases rather abruptly. (RT 10/19, 320:9 - 323:19.)

SEPTEMBER 1 - NOVEMBER 23: THE CONTINUING LOCKOUT

Keith Bernard, General Manager of BART, testified that he was convinced that the "vast number" of all union employees were innocent of any wrongdoing. (RT v. 6, 341:2-10.)

Nonetheless, upon reporting to work on September 1, 1979, all union employees were told that they would not be permitted

to enter the premises. All BART employees who were not members of the two unions were permitted to work. (RT v. 4, 105:2-8.)

BART informed the union employees that it would continue to refuse to permit them to work until such time as a collective bargaining agreement would be signed with both unions, despite the employees' statements individually and through their unions that they were unconditionally ready and available to work if only BART would let them. (Ex. 19, Ex. 56; RT v. 6, 221:1-19; 226:12 - 228:3; 341:26 - 342:9; v. 4, 104:6 - 105:8.)

Most of the members of the unions had jobs which needed to be done even if the trains were not running and the stations were not open, such as maintenance, gardening, secretarial work, technical work, accounting work, electrical work, janitorial work, and clerical work. (RT 10/19:8-19, 196:1 - 212:27.) The duties they would have performed were assigned to management personnel and temporary personnel. (RT 10/18, 132:13-28; RT v. 6, 104:5-6.)

On October 4, 1979, BART started limited train service between Lafayette and 24th Street stations, using management and supervisory personnel. Thereafter, it expanded the service. At first, eight trains were used, much less than had been running at the close of the day on August 31, 1979. Keith Bernard had refused to even explore the alternative of a truncated service, leaving off 13% of the total system (the Concord line), on August 31, 1979, but apparently had no problem authorizing a much more truncated and limited service on October 4, 1979. (RT v. 5, 271:10 - 272:18; v. 4, 102:18 - 104:6.)

NOVEMBER 23: THE END OF THE LOCKOUT

On November 22, 1979, the collective bargaining agreements with both unions were signed, in which the unions essentially capitulated on the hotly disputed COLA issue. The next day, November 23, the union members were permitted to go back to work for the first time since August 31. (RT v. 5, 183:7-15.)

ARGUMENT

THE TRIAL COURT ERRED IN ITS FIRST AMENDMENT ANALYSIS; BART VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS OF FREEDOM OF ASSOCIATION; A LOCKOUT ANALYSIS IN A GOVERNMENTAL EMPLOYMENT SITUATION MUST TAKE INTO ACCOUNT CERTAIN CONSTITUTIONAL ISSUES NOT GERMANE TO AN ANALYSIS OF A LOCKOUT IN A PRIVATE EMPLOYMENT SITUATION.

The Court of Appeal conceded that "the propriety of BART's refusal to allow to work those union members against whom there were no pending charges" was a "troubling question". It noted that "to the extent they were refused to work, such refusal rested solely upon their membership in UPE 390 or ATU 1555." (Emphasis added). (CA:Section I.)

It should be noted that by BART's own admission, the "vast number" of all employees were innocent of any wrongdoing—and the Court of Appeal did not dispute this undisputed fact. Nonetheless, these working men and women (and their families) were penalized and deprived of their livelihood and caused great economic hardship for almost three months based solely on their mere membership in ATU 1555 or SEIU 390.

Despite the fact that the Court of Appeal was apparently troubled by this fact of concededly innocent people being penalized for acts they did not participate in, it for some reason chose to totally disregard the correct framework of analysis for determining whether there has been a violation of freedom of association rights applicable to the instant case, a framework of analysis which has been established by a long line federal cases. See, e.g., *United States v. Robel* (1967) 389 U.S. 258; *Elfbrandt v. Russell* (1966) 384 U.S. 11; *In Re Stolar* (1971) 401 U.S. 29, 30; *Keyishian v. Board of Regents* (1967) 385 U.S. 590; *McLaughlin v. Tilendis* (7th Cir. 1968) 398 F.2d 287.

Instead of relying on the aforesaid and similar freedom of association cases, which it should have done since the issue herein is penalization of 2000 members of the class (and their families) based solely on their being members of either of two unions, the Court of Appeal for some unknown reason relied on a freedom

of speech case, *Pickering v. Board of Education* (1968) 391 U.S. 563, 572-573, for its analysis of the issue.

However, in *Pickering,* the Supreme Court, at p. 569, clearly indicated that its analysis in said case was only relevant to analyzing freedom of speech cases in the context of the factual circumstances discussed in the case (which related to the issue of whether critical statements made by teachers and other public employees regarding their superiors should be grounds for dismissal), and was not attempting to lay down any general standard beyond said context of the case (and certainly not for freedom of association cases). Thus, the use of the *Pickering* case by the Court of Appeal to deal with freedom of association issues in the context herein was totally inapposite.

Furthermore, the Court of Appeal did not even distill the *Pickering* standard correctly. The Court of Appeal somehow distilled from *Pickering* that if the First Amendment activity "interfered with the efficient operation of BART or with their own ability to do their jobs", dismissal or suspension would be appropriate. (CA:Section I.) However, *Pickering* recognized that in First Amendment issues, one always has a balancing test between the interest of the individual to engage in First Amendment activity and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering* refers to "the conflicting claims of First Amendment protection and the need for orderly school administration", indicating that almost all First Amendment activity can in some manner interfere with the efficient operation of a public entity. The mere fact that there is some interference with the efficient operation of the public entity would not justify, by itself, penalizing or prohibiting the First Amendment activity. Rather, *Pickering* appears to indicate that a balancing test should be engaged in to determine if a legitimate state interest manifestly outweighs the importance of permitting the First Amendment activity in the context of the case.

In a long line of cases, federal courts have considered the balancing of the importance of a person's first amendment right of association on the one hand, and a legitimate state interest being adversely affected on the other hand, and have distilled certain principles directly applicable to this case. What is incredible

about the Court of Appeal's opinion is the total omission from said opinion of any discussion of these directly applicable cases and the principles they have established. These cases clearly disallow guilt by association—where one member of an association is penalized for arguably unlawful conduct engaged in by another member of the association. The cases make clear that if a governmental employer cannot prove that a member of an association has participated in wrongdoing himself or that he has the specific intent to further the unlawful aims of the group, the governmental employer cannot penalize said person based on his membership in the association (even if the association, or other members in it, have committed misdeeds, or even if the association advocates unlawful aims).

In *United States v. Robel* (1967) 389 U.S. 258, the Court ruled that a law which prohibited members of certain Communist-action organizations from engaging in any employment in any defense facility was unconstitutional in that it improperly "establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it."

The Government in its argument to the Court in *Robel* emphasized that its purpose in passing the statute was to reduce the threat of sabotage and espionage in the Nation's defense plants, and the Court acknowledged that "such a prophylactic measure is not insubstantial." But the Court noted that when First Amendment rights are involved, "[i]t has become axiomatic that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms'." The Court noted that people become members of an organization for a variety of reasons, and they may be unaware of the organization's unlawful aims or may disagree with the organization's unlawful aims, and they should not be penalized in their employment by a public entity because of the fact of their membership in a particular organization.

The Court further held that there were other ways the Government could safeguard its vital interest, such as by prescribing criminal penalties for those who would engage in espionage and sabotage, and by instituting an individualized, industrial security screening program. In response to the Government's argument that such an individualized industrial screening program would

be inadequate and ineffective, the Court stated that when government action "...imposes a substantial burden on protected First Amendment activities, Congress *must* achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." (Emphasis added.)

In *Elfbrandt v. Russell* (1966) 384 U.S. 11, the Supreme Court held that, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees."

In *In Re Stolar* (1971) 401 U.S. 29, 30, the Court stated that "the First Amendment prohibits [a state] from penalizing a man solely because he is a member of a particular organization."

In *Keyishian v. Board of Regents* (1967) 385 U.S. 590, the Court stated that, "Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants."

In accordance with the principles set forth in the aforesaid cases, membership in a labor union is protected by the right of association under the First and Fourteenth Amendments. *Thomas v. Collins* (1945) 323 U.S. 516; *McLaughlin v. Tilendis* (7th Cir. 1968) 398 F.2d 287; *Lontine v. VanCleave* (10th Cir. 1973) 438 F.2d 966; *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association* (1985) 38 Cal.3d 564.

In *McLaughlin v. Tilendis, supra,* the Court held that a complaint stating that a public employee was discharged solely because of his membership in a union stated a cause of action under 42 U.S.C. Section 1983. The Court stated, "Even if this record disclosed that the union was connected with unlawful activity, the bare fact [of] that membership does not justify charging members with their organization's misdeeds. Idem. A contrary rule would bite more deeply into associational freedom than is necessary to achieve legitimate state interests, thereby violating the First Amendment."

The Court in *McLaughlin* indicated that it would be necessary for the State to show that the *individual* plaintiffs themselves had engaged in any illegal strikes or picketing to justify their dismissal; the fact that other members of the same union might have engaged

in disruptive or illegal activity would not justify the taking of adverse employment action against union members who did not engage in disruptive or illegal activity.

In *Tygrett v. Barry* (D.C. Cir. 1980) 627 F.2d 1279, the Court stated that, "When confronted with firings that implicate a public employee's First Amendment rights, the courts are required to conduct an *individualized* and searching review of the factors asserted by the employer to justify the discharge." (Emphasis added.)

In *Familias Unidas v. Briscoe* (5th Cir. 1980) 619 F.2d 391, 402 (fn. 10), the Court stated, "The decision of certain members, perhaps a majority, of the organization then to sponsor, aid, and participate in an unlawful boycott in the name of the organization should not be imputed to those who never anticipated joining in or supporting such an effort."

The Court of Appeal in its opinion did not attempt to point to any evidence that the members of plaintiffs' class shared any unlawful purposes it might ascribe to the union leadership, or that the members of plaintiffs' class had any specific intent to further any allegedly unlawful aims of the unions or to participate in any unlawful activities of the unions. Rather, it attempted to supply a substitute for the necessary mens rea by implying the unions were in a position to coerce the members of the union (and of plaintiffs' class) into doing unlawful acts or furthering unlawful aims regardless of whether said members would want to or not.

In this regard, the Court of Appeal noted that, "In order to retain their jobs the employees had to belong to the union." It then went on to state that "the union was threatening discipline if employees complied with management requests for overtime or reassignment", and that accordingly, "[m]embers of these unions were in the untenable situation of being subject to union discipline if they did work and employer discipline if they did not." The Court of Appeal concluded that therefore, "[t]heir union membership imposed demands upon them which directly affected the efficient operation of the transit system." (CA:Section I.)

In engaging in the aforesaid analysis, the Court of Appeal failed to realize that it is against the law for a union to discipline members for refusing to engage in unprotected concerted activities,

or for refusing to engage in concerted activities which jeopardize their jobs and employment relationship, or for refusing to engage in concerted activities which do not reflect a legitimate union interest, or for refusing to engage in concerted activities which are against national labor policy and public policy, or for refusing to engage in any activity which would expose them to risk of being lawfully discharged by the employer or subjected to lawful imposition of disciplinary measures by the employer. *National Labor Relations Board v. GAIU Local 13-B, Graphic Arts International Union*, 682 F.2d 304 (1982); *Schofield v. NLRB*, 394 U.S. 423 (1969). Indeed, in *National Labor Relations Board v. GAIU Local 13-B, Graphic Arts International Union, supra*, which contains an excellent discussion and review of case law on the entire subject, the union had disciplined some of its members for disregarding its orders not to work overtime after the employer instituted a mandatory overtime policy (a situation which the Court of Appeal seems to feel in its opinion might have developed in the instant case). The Court in *GAIU* ruled that said discipline had to be rescinded and the employees compensated for damages suffered because of it. See also, 29 U.S.C. Sections 152, 157, 158.

Thus, members of the class were not being put in "the untenable situation of being subject to union discipline if they did work and employer discipline if they did not" (as the Court of Appeal opinion, Section I, asserts), because the union could not have lawfully disciplined them for refusing to do something which would have subjected them to discipline by the employer.

Additionally, it is pure speculation that the unions would have carried out any discipline, since there is no evidence in the record that they did. The only threat to discipline made by any union official was by a leader of ATU 1555 pertaining to any employee thinking of replacing one of the train operators who dropped sick on the Concord line. Such a threat was an idle threat, since a slowdown is not a lawful concerted activity, and discipline for refusing to participate in it would have been unlawful. No actual discipline was carried out against any persons who went ahead and served as a replacement. As noted earlier, unlike the Court of Appeal implies in its opinion, there was no threat ever made to discipline anyone for working overtime. As seen by the *GAIU* and *Schofield* rulings, such a threat would have been an idle threat,

as well, since if mandatory overtime was a lawful term of employment (as BART management contends), it would have been against the law for the unions to have disciplined anyone for working it. If mandatory overtime was not a lawful term of employment, then it would have been against the law for BART to discipline anyone for not working it.

Thus, the requirement of specific intent of participating in unlawful activity of an organization is not met in the instant case. Nor was it appropriate for the State Court of Appeal to create an unprecedented substitute for the element of specific intent on the employee's part, to wit, a speculative conclusion that the vast majority of indisputably innocent and loyal employees would have somehow been coerced into participating in unlawful activity regardless of their lack of intent or desire to do so, since a guess that such discipline would have occurred is pure speculation and not supported by past performance or conduct, since discipline for refusing to engage in any alleged unlawful activity did not in fact occur, since any discipline the unions would have tried to mete out to an employee for refusing to engage in any wrongful activity would have been unlawful and impossible to enforce and effectuate, and since there is no evidence that the vast number of innocent, loyal employees would have submitted to any coercion by the unions to engage in wrongful activity (even assuming *arguendo* any such coercion would have been applied).

The State Court of Appeal's attempt to substitute a vague speculative coercion standard in place of a requirement of specific intent to further an organization's allegedly unlawful goals represents a dangerous deviation from the *Robel-Stolar-Keyishian* line of cases, and a dangerous incursion into the doctrine that guilt by association is not to be countenanced by the law in public employment situations. The Supreme Court should grant the petition for writ of certiorari herein to discuss the application of the principles developed in the *Robel-Stolar-Keyishian* line of cases to public employee lockout situations—a certain strict standard needs to be followed before a public employee can be deprived of his employment and livelihood, even for a period of three months, because of his membership in an organization (labor union in this case).

The trial court clearly found there was a lockout. (See CT

132:15 - 133:11.) The Court of Appeal opinion, after hedging a little bit, proceeded to assume that the trial court concluded a lockout occurred, and analyzed the legality of a lockout by a governmental employer under the facts and circumstances of the case. (CA:Section I.)

The Supreme Court has never addressed the issue of the legality of a lockout of union employees by a governmental employer; nor are petitioners aware of any published case law by any other court dealing directly with said issue. Given the large number of local and state governmental employees who are unionized, the serious economic hardship visited upon employees and their families in a lockout, and the strong interest of the public in continued goverment services during the period of a labor dispute, the case herein presents a timely and highly important federal question which needs to be settled by this Court—under what circumstances, if any, is a public lockout legal and not violative of public employees' First Amendment right of freedom of association, right of due process, and right to be free of arbitrary governmental action.

In *American Ship Building v. Labor Board* (1965) 380 U.S.300, the Supreme Court indicated that a lockout or "temporary layoff of employees" would be legal by a *private* employer if it was used solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse had been reached.

However, in the instant case, we have a *public* employer engaging in a lockout, and, accordingly, certain constitutional limitations apply which would not apply to a private employer.

In *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, the Court noted on p. 226, fn. 3, that "Nothing in our opinion embraces the 'premise that public employers are under no greater constitutional constraints than their counterparts in the private sector,' post, at 245 (Powell, J., concurring in judgment), or indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints, see post, at 252."

The Court in *Abood* went on to note the "often-noted differences in the nature of collective bargaining in the public and private sectors." (At 227.) The Court then stated that in this regard, "The uniqueness of public employment is *not in the employees*

nor in the work performed; the uniqueness is in the special character of the employer." (Emphasis supplied by the Court.) (pp. 230-231.) The Court stated that with some exceptions a public *employee* should not have less First Amendment rights than a private *employee* (an argument which might also be applicable to the recent case of *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association* (1985) 38 Cal.3d 564, in which the California Supreme Court legalized strikes by public employees in the State of California). However, the U.S. Supreme Court noted in *Abood* that the constraints on *governmental employer* conduct might indeed be significantly greater than on private employer conduct, indicating that among other constraints there might be constitutional constraints on a public employer which would not apply to a private employer.

In "Public Sector Bargaining: Problems of Governmental Decision Making' (1979) 44 U.Cin.L.Rev. 669, which article the Court in *Abood* referred to, Professor Clyde W. Summers took note of the different policy, legal, and constitutional constraints on a public employer as opposed to a private employer, and indicated that certain constitutional issues, such as the First Amendment, might apply to the resolution of questions in public employer-employee disputes. A case cited in the article which contained a First Amendment issue, *Madison School District v. Wisconsin Employment Relations Comm'n* (Wis. 1975) 231 N.W.2d 706, was later reversed by the Supreme Court in *Madison School Dist. v. Wisconsin Employment Relations Comm'n* (1976) 429 U.S. 167, in a way which emphasized the relevance and importance of First Amendment issues in the public labor law area.

It is noteworthy that in *American Ship Building Co. v. N.L.R.B., supra*, the Supreme Court uses the term "temporary layoff" to describe a lockout, because in the public employment arena, unlike in the private employment arena, a "layoff" is a personnel action which might very well be subject to various due process considerations, if not properly implemented, and definitely would be subject to redress if it were implemented in violation of First Amendment rights. (See, e.g., *Mabey v. Reagan* [9th Cir. 1976] 537 F.2d 1036.)

The fact that strikes by government employees are in certain

instances legal does not mean that lockouts of government employees by government employers must also be considered legal. Indeed, in the case legalizing public employee strikes in the State of California, *County Sanitation District No. 2, supra*, the California Supreme Court, in reviewing the weapons at the public employer's disposal which would act to counteract a settling of a strike at any cost, conspicuously omitted any reference to a lockout. (*Supra*, at pp. 577-579.)

Furthermore, there is no showing that a lockout is a necessary bargaining equalizer to a strike. For example, in *American Ship Building Co. v. Labor Board, supra*, the National Labor Relations Board had decided that giving the right to a private employer to lock out its employees would tilt the bargaining balance unfairly to the private employer. The United States Supreme Court overruled the Board's decision and ruled that it was not appropriate to try to resolve labor law questions based on considerations of trying to equalize bargaining power. Thus, a lockout has never been justified by the United States Supreme Court as some kind of bargaining power equalizer; and indeed, the National Labor Relations Board had taken the position that permitting a lockout would tilt the balance to the employer.

Thus, it simply does not follow from the fact that a strike by public employees is legal under certain circumstances, that a lockout by a public employer is necessarily legal under certain circumstances; nor, does it follow that assuming there are certain circumstances under which a public employer lockout would be lawful, that a test parallel and analogous to that used in determining the lawfulness of a public employee strike would be applicable.

In the instant case, approximately 2,000 members of plaintiffs' class were locked out or laid off—were penalized—for almost three months and lost their livelihoods during said time, based solely on their being members of either of the two unions. Since the governmental employer did not show that the members of the class participated in individual acts of wrongdoing or had the specific intent to further any alleged unlawful aims of either of the two unions, it violated plaintiffs' freedom of association rights when it refused to permit plaintiffs' class to work between September 1 and November 23, 1979, solely on the basis that said employees were members of one of the two unions.

The Court of Appeal in its analysis also confused the decision to

shut down passenger service with the separate decision to lay off (or lock out) the members of plaintiffs' class (and the implementation of said latter decision). Even after passenger service was shut down, employees who were not members of plaintiffs' class were permitted to work while members of plaintiffs' class were not. There were many jobs which needed to be done even in the absence of passenger service going on, e.g., maintenance, clerical work, electrical work, custodial work, secretarial work, gardening work, but members of plaintiffs' class were not allowed to work at said ongoing jobs, and temporary and management workers replaced them at said tasks. When limited train service resumed in October, members of plaintiffs' class were still not permitted to work. Thus, even though defendant BART undoubtedly had legal discretionary authority to decide to suspend operation of the trains, it does not follow that it had legal authority to lock out union workers thereafter while at the same time permitting non-union workers to continue to report to work and draw a paycheck.

There were any number of alternative approaches the General Manager of BART could have used if he truly felt there was a problem in providing adequate passenger service to the public rather than locking out all the union workers. He could have shut down part or all of passenger train service on a temporary basis, and permitted the union workers to continue to work just as he was permitting non-union workers to continue to work; he could have closed the 13% of the system affected by the sick-in, provided bus service to that part of the system, and kept the rest of the system open; he could have disciplined the offending train operators who had reported in sick on August 31 if they had really engaged in improper conduct; he could have met with representatives of the unions to see if some resolution of the immediate problem which had arisen on August 31, 1979 could have been worked out (such as having a neutral safety inspector certify the trains in question were safe). However, he did not even consider these or any other alternatives. Rather, apparently hoping to use economic leverage on the unions to bring an end to the labor dispute (as recognized by the trial court opinion as a probable motive of the lock-out), he took the elephant gun approach of rushing in and locking out (or laying off) all employees who were members of the two unions, even though he conceded the vast majority were undoubtedly loyal and totally innocent of any wrongdoing.

By taking this approach, BART violated another principle applicable to an analysis of First Amendment issues which the Court of Appeal ignored in its analysis, to wit: Even when a compelling state purpose is involved, state actions must be constructed with narrow specificity so as not to impinge upon "our most precious freedoms". *NAACP v. Button* (1963) 371 U.S. 415; *Elfbrandt v. Russell, supra*; *Shelton v. Tucker* (1960) 364 U.S. 480; *In Re Stolar, supra*, at 90.

The Court of Appeal's opinion also suggests that a 42 U.S.C. Section 1983 claim *might* be barred in the instant case because the punishment imposed on the members of plaintiffs' class solely for their being members of either of the two unions was not dismissal, but rather the somewhat lesser sanction of being denied work and pay for approximately three months. Numerous cases stand for the proposition that a penalization of First Amendment rights in any form is actionable under 42 U.S.C. Section 1983, and sanctions far less than dismissal are actionable in this regard. See *Perry v. Sindermann* (1972) 408 U.S. 593; *Castleberry v. Langford* (N.D. Texas 1977) 428 F.Supp. 676 (suspension for four months); *Thomas v. Younglove* (9th Cir. 1976) 545 F.2d 1171 (lower salaries and harassment); *Lontine v. Van Cleave* (10th Cir. 1973) 438 F.2d 966 (suspension or dismissal). Being deprived of work and pay for almost three months was a severe penalty and severe hardship for the 2,000 members of the class (and their families), was a penalization of their exercise of their First Amendment right of freedom of association, and is actionable under 42 U.S.C. Section 1983. The Supreme Court should grant this petition for writ of certiorari and amplify upon the principles set forth in *Perry v. Sindermann, supra*, and make it clear that a three month deprivation of employment based on an employee's mere membership in a union without specific intent to further any alleged unlawful aims of the union is a sufficient penalization of the exercise of First Amendment rights to be actionable under 42 U.S.C. Section 1983.

CONCLUSION

The petition for writ of certiorari should be granted for all of the reasons set forth previously herein. DATED: August 11, 1987.

LOUIS A. HIGHMAN

By_____

Attorney for Plaintiffs

[Not to be published in official reports]

[Filed Feb. 20, 1987]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

ROBERT J. SOLIS et al.,
Plaintiffs and Appellants,
v. BAY AREA RAPID TRANSIT DISTRICT et al.,
Defendants and Respondents.

A026629

(San Francisco Super.Ct.No. 779391)

Plaintiffs, members of a certified class[1] consisting of transit employees who in 1979 were members of two unions, appeal a judgment denying them relief after court trial on causes of action brought pursuant to 42 United States Code section 1983 and Public Utilities Code section 28850, for wages lost during a labor dispute with defendant Bay Area Rapid Transit District (BART).

Facts and Procedural History

In March 1979 negotiations on a new contract of employment began between BART and two unions, Service Employees International Union or, as it was otherwise known, United Public Employees Local 390 (UPE 390) which represented all train maintenance employees, and Amalgamated Transit Union International Division 1555 (ATU 1555) which represented train operators, station agents and various clerical workers. BART is an agency shop and anyone who occupies a certain job classification must belong to the appropriate union. (See *Rae v. Bay Area Rapid Transit Supervisory etc. Assn.* (1980) 114 Cal.App.3d 147,

152-154 [holding Pub. Util. Code Sections 28500-29757 implicitly permit an agency shop agreement].) The two unions, UPE 390 and ATU 1555, pursuant to a determination by the State Conciliation Service, jointly bargained with BART for the general provisions of each union's contract. (Pub. Util. Code, Sec. 28851.) At the time the negotiations began members of both unions were working under a contract due to expire June 30, 1979.

That contract did expire without the unions and BART having reached a new agreement, but with both sides agreeing to continue negotiations under an indefinite extension of the old contract terms. A substantial area of dispute between the parties was retention of a cost-of-living adjustment. On July 8, 1979, BART made what it termed its final offer to the unions which it required they accept within two days, otherwise BART announced that, beginning July 11, it would no longer continue to abide by the terms of the expired contract.

During June and July BART began having difficulty getting an adequate number of train cars maintained so that they could be put into service. This difficulty with car count led to the formation of a committee, with union representation which was briefly in existence in mid-July until BART disbanded it. According to the trial testimony of BART's general manager an "ideal" number of cars in service would be 280, but during the period from July 19 through August 20 the system was averaging only 204 cars in service. The slowdown in car maintenance work apparently resulted directly from instructions by UPE 390 to its members to perform all repair jobs "by the book" — that is, the mechanics were advised to consult their repair manuals for every procedure. The slowed maintenance work was especially pronounced at the Concord shop, and in response BART announced its intention to transfer all the Concord maintenance staff to other maintenance yards and install management personnel at the Concord shop. Around midnight on July 28, various Concord employees, joined by representatives of UPE 390 and ATU 1555, took over the Concord shop and occupied it for some five days. They eventually relinquished the facility under a court order.[2] Meanwhile, in July, there had been other instances of unrest. On July 11, the system was shut down for 15 minutes, allegedly in response to the absence of operators for emergency vehicles which must

be manned at all times during passenger service. At trial there was testimony disputing BART's claim that these operators had in fact absented themselves from their posts. There was also a brief sit-in by various clerical employees sometime in mid-July.

On August 20, BART issued "Interim Terms and Conditions of Employment." These terms and conditions abolished the grievance procedure which had been in effect under the contract, required employees to work overtime, and eliminated sick leave for the first three days of any absence.

Damage to tools and vehicles, which BART believed was the result of sabotage, became commonplace. A train door was tampered with and damaged so that it might suddenly come open when the train was in motion. On August 27, at the Concord yard, a morning inspection revealed that some 30 cars had been vandalized; the air bags which regulate the car's height with respect to the train platform had been slashed. BART transferred all its employees out of the Concord yard immediately. Managerial staff took over the Concord shop.

At a press conference on August 29, the executive director of UPE 390 opined, "We still think that a strike is inevitable....We are engaged, if anyone doesn't know it by now, in a gorilla [sic] warfare activity against BART....In effect, we have been on strike for 2 months."

On Friday morning, August 31, at 8 a.m., BART had only 21 trains instead of a normal number of 32 in service. Those trains were running 13 minutes behind schedule. Because many train operators were not reporting or were leaving work, "dropping sick," two of the rush-hour trains were driven by management staff. As the day progressed the number of train operators declined even further with many operators refusing overtime or refusing to accept transfers to Concord line trains. ATU 1555 had advised the train operators to "drop sick" if they were sent to Concord. According to ATU's president and business agent, James Danzy, he advised the train operators to "drop sick" because BART was threatening to fire anyone who refused to work overtime. A bulletin from ATU dated August 31, but apparently not circulated until late that day, repeated the recommendation that operators assigned to the Concord line develop "BART Flu" and warned that "Any member who replaces a brother or sister

that is ill with BART Flu will be brought up on charges before a trial committee by the Union."

Between two and four o'clock in the afternoon BART's general manager decided to close the system. From the time of the shutdown at 5 p.m. BART police were ordered not to allow members of either union onto the premises. Members of both unions were not permitted to return to work until November 23, after the unions and BART had agreed to a new contract.

This action was brought as a class action on behalf of all employees of BART who were unable to work from August 31 through November 22, 1979. The class was certified by an order filed October 25, 1982. On February 22, 1984, after trial to the court, judgment was entered in favor of defendants. Plaintiffs bring a timely appeal from that judgment.

I.

Plaintiffs contend that the trial court erred by declining to allow them to recover on their claim made under 42 United States Code section 1983.

Section 1983 Claim

Although the trial court found that plaintiffs could state a cause of action against BART as a state actor for its alleged deprivation of their First Amendment rights under 42 United States Code section 1983, the trial court declined plaintiffs any recovery on that claim. The trial court concluded that the activities in which plaintiffs were engaged were not protected by the First Amendment.

Plaintiffs argue that their rights of association were abridged by BART when it shut down the system and refused to permit them to return to work until a new contract was signed. They contend that the mere fact of their membership in one of the two unions is not a proper basis upon which to deny them, even temporarily, their jobs as public employees.

Liberty of speech and association, guaranteed by the First Amendment and made applicable to the states under the Fourteenth Amendment to our federal Constitution, extends to speech about unions and membership in them. (*Thomas v. Collins*(1945) 323 U.S. 516, 531.) Thus a state employer may not fire public employees solely for exercising their First Amendment rights, regard-

less of whether the employees have a contractual right to their jobs. (*Perry v. Sindermann* (1972) 408 U.S. 593, 597-598.)

Plaintiffs rely upon decisions in which public employees were discharged, in whole or in part, because they had exercised their First Amendment rights. The validity of such discharges depends upon whether the conduct which gives rise to them was wholly protected under the First Amendment or partly protected and partly unprotected. (*Tygrett v. Barry* (D.C. Cir. 1980) 627 F.2d 1279, 1287, fn. 9.) If the conduct is part protected and part not, then the employer must show, by a preponderance of the evidence, that it would have reached the same decision to discharge even in the absence of the protected conduct. (*Mt. Healthy City Board Ed. v. Doyle* (1977) 429 U.S. 274, reaff'd. in *Givhan v. Western Line Consol. School Dist.* (1979) 439 U.S. 410, 416-417.) When the conduct forming the basis for the discharge is wholly protected by the First Amendment, the firing can only be sustained if the employer can show that the conduct impaired the employee's ability to perform on the job or interfered with the efficient operation of the agency. (*Pickering v. Board of Education* (1968) 391 U.S. 563, 572-573.)

Both tests are relevant here because there were two groups of employees involved. The first group consisted of those members of the two unions who had participated in sabotage, refused to work overtime, or left their posts without permission. Such conduct rendered them subject to discipline, at least from the institution of the August 20 Interim Terms and Conditions of Employment, if not before. Thus, had BART given individualized layoff notices, for some of the union members their layoff might have been justified by conduct which was unprotected under the First Amendment. In fact, no such individualized discipline was imposed, except in a very few cases.

The more troubling question is the propriety of BART's refusal to allow to work those union members against whom there were no pending disciplinary charges. The trial court found, on ample evidence, that, to the extent they were refused the opportunity to work, such refusal rested solely upon their membership in UPE 390 or ATU 1555.

Under the *Pickering* test, however, even their dismissal would be appropriate if their membership in the union interfered with

the efficient operation of BART or with their own ability to do their jobs. (*Pickering v. Board of Education, supra*, 391 U.S. 563, 572-573.) Membership in the two unions had indeed come to threaten the efficient operation of BART on August 31. ATU 1555 prepared a bulletin dated August 31 which threatened that any member who replaced a member who had dropped sick would be subject to union charges. A similar call for "discipline" in the face of management calls for overtime was made on behalf of both unions on August 27. After the president of ATU 1555 was told on August 31 at about 5:15 p.m. that there would be a management press conference, station agents throughout downtown San Francisco dropped sick. In order to retain their jobs the employees had to belong to the union. Yet the union was now threatening discipline if the employees complied with management requests for overtime or reassignment. Under the Interim Terms and Conditions of Employment adopted unilaterally by BART on August 20, acceptance of overtime was mandatory. Members of these unions were in the untenable situation of being subject to union discipline if they did work and employer discipline if they did not. Their union membership imposed demands upon them which directly affected the efficient operation of the transit system.

In discussing the First Amendment cases above we have assumed, for the sake of argument, that those cases which involve employee firings are the appropriate precedent to apply where employees are not permanently discharged but temporarily denied their right to work. At oral argument plaintiffs contended that, in substance, those employees who were guilty only of union membership were, in effect, subjected to a three-month suspension. As we suggest above, even were they correct, the trial court could appropriately have reached the same result which it did under an alternative analysis.

Lockout or Strike

Plaintiffs contend that the trial court made a finding of fact that BART had locked them out.[3] The court's statement of decision is equivocal on this point. In the portion entitled "Discussion and Factual Determination," the court never characterizes the system shutdown as a "lockout." Only later in its discussion of the issues does the trial court use the term at least twice in a

way suggesting that it was making a finding that a lockout had occurred.

Assuming that the trial court did conclude that BART had locked out the members of UPE 390 and ATU 1555, what legal consequences flow from that factual determination?

At the time the transit system was shut down on August 31, plaintiffs were no longer working under a contract which prohibited strikes and lockouts; that provision was deleted from the Interim Terms and Conditions of Employment set out by BART on August 20. Therefore, there was no contractual prohibition against a management lockout. Nor do plaintiffs establish any ground in law for finding the lockout to be illegal. BART as a state subdivision of government is not subject to the National Labor Relations Act (NLRA). (29 U.S.C. Sec. 152(2); *San Francisco Bay Area Rapid Transit Dist. v. Superior Court, supra*, 97 Cal.App.3d 153, 161.) Even if it were, we are not persuaded that, under the federal cases applying the NLRA, this lockout would constitute an unfair labor practice. (29 U.S.C. Sec. 158(a).) Under the NLRA, once a bargaining impasse has been reached, a lockout is a permissible form of economic leverage for management to use, so long as the employer is not motivated by the purpose of impairing the employee's right to strike or to bargain collectively. (*American Ship Bldg. v. Labor Board* (1965) 380 U.S. 300, 308-309; see *Lane v. N.L.R.B.* (D.C. Cir. 1969) 418 F.2d 1208, 1210-1212.)

Here the parties agreed that a bargaining impasse had been reached long before the system was shut down. No substantive offers or counteroffers by either side are reflected in the record after the unions rejected BART's "final offer" of July 8. In this case the trial court expressly found that the lockout was *not* the result of BART's desire to "discriminate" or "retaliate" against the unions. This is a factual finding to which plaintiffs do not take exception. Applying the rationale underlying the federal rule to this wholly state context, we cannot say that BART's lockout of the employees was illegal because it was motivated by antiunion animus.

Furthermore, the trial court found that the lockout here was justified by "legitimate business necessity." In the context of a public transit system where the "business" of the system is public service there was ample factual support in the record for the

trial court's implicit finding that BART could no longer ensure normal or safe operation of the entire system as of August 31.

We do not suggest that a lockout by a public employer would be permissible in every case once a bargaining impasse has been reached. Quite to the contrary, we merely find, on the facts of this case where such a situation pertained, *and* where there was a serious threat to the continued safe operation of a mass transit system whose thousands of passengers might otherwise be stranded or endangered while traveling through the Transbay tube or the East Bay Tunnel or on some elevated portion of the system, that the potential hazards to the public outweighed the injury suffered by the members of the umions for the period of the lockout.

For the foregoing reasons we conclude that the trial court did not err in refusing to permit recovery to plaintiffs on their section 1983 claim.

II.

Plaintiffs also argue that the trial court erred when it declined to find that BART's lockout was not an abridgement of its duty, imposed by Public Utilities Code section 28850, to bargain in good faith with the unions.[4]

As a threshold matter we address BART's contention that plaintiff's section 28850 claim was barred by their failure to file a claim with BART, under Government Code section 910 et seq., for damages in the form of their lost wages. The short answer to this contention is that Government Code section 905, subdivision (c), expressly exempts claims for wages from the claims procedure. The trial court did not err in finding that plaintiffs' section 28850 claim was not barred.

Public Utilities Code section 28850 imposes a mandatory duty upon BART and upon the unions representing its workers to "bargain in good faith and make all reasonable efforts to reach agreement on the terms of a written contract...." (*San Francisco Bay Area Rapid Transit Dist. v. Superior Court*, *supra*, 97 Cal.App.3d 153, 160.) What constitutes good faith bargaining under this section has never been judicially defined.

Plaintiffs ask us to impose the "meet and confer" requirements of Government Code section 3505 upon BART. As we have previ-

ously held, BART is not subject to that provision of the Government Code because it has "its own statutorily prescribed method of administering employer-employee relations (see Gov. Code, Sec. 3500)." (*San Francisco Bay Area Rapid Transit Dist. v. Superior Court, supra*, 97 Cal.App.3d 153, 161, fn. 5.) Nor is the NLRA prohibition of refusals to engage in collective bargaining as unfair labor practices (29 U.S.C. Sec. 158(a)(5)) especially helpful to our inquiry. That act defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith...." (29 U.S.C. Sec. 158(d).)

Admittedly where the language of a California statute parallels that of a federal statute federal case law may be of guidance in interpreting the meaning of the state law. (*Lipow v. Regents of University of California* (1975) 54 Cal.App.3d 215, 225-226.) However, we do not have parallel language here. Nowhere in Public Utilities Code section 28850 is there any reference to "meet and confer." Accordingly, we decline to adopt federal precedent interpreting the duty to "meet and confer" as defining the duty to "bargain in good faith" under Public Utilities Code section 28850.

The duty to bargain in good faith is not a duty to come to a resolution of the dispute, but a duty imposed on how bargaining is conducted. Are the parties showing a serious desire to resolve their differences? (*Labor Board v. Insurance Agents* (1960) 361 U.S. 477, 488.) Such an inquiry is obviously a subjective one.

Plaintiffs argue that BART refused to "bargain in good faith" by unilaterally changing the conditions of employment first on July 18 and again on August 20 when it issued its Interim Terms and Conditions of Employment. Likewise, they contend it was not good faith bargaining for BART to lock out the employees without giving the unions prior notice of the lockout to permit them to offer proposals for an alternative action.

When the contract between BART and the two unions expired on June 30, the parties agreed to continue to proceed under the provisions of that contract. BART's final offer of July 8 was made contingent upon its willingness to extend the expired contract only through midnight July 10. By rejecting that "final offer" the unions also brought to an end the extension of the old contract.

Only some seven days later did BART first modify its conditions of employment. There was evidence at trial that some of the new terms and conditions imposed by BART were implemented in response to union moves. For example, a new sick leave policy instituted on August 20 provided that the first three days of each absence for sickness would be without pay. This change from the sick leave policy pertaining under the old contract was, according to the testimony of BART's manager of employee relations, made in response to union calls for selective strikes accomplished by mass "drop sicks." Likewise, the provisions for mandatory overtime was, according to BART, a response to the unions' calls for employees to refuse overtime work.

On the day of the shutdown BART management did make one unsuccessful attempt to contact the president of ATU 1555. The union president never returned the call. Apparently that abortive attempt was the only effort BART management made to discuss the events of August 31 with the unions. From this vantage point it is impossible to say whether contact between BART and the unions might have avoided the shutdown or accelerated it. By 3:30 in the afternoon of August 31 BART was having to curtail service on both the Concord and Richmond lines by stopping trains at MacArthur station in Oakland. It would not have been implausible for BART management to fear that all service would come to a stop before the evening commute was over were they to give the unions advance warning of a possible shutdown at the end of the day.

Plaintiffs do not point to evidence in the record showing that BART had refused to engage in collective bargaining prior to the shutdown. Thus, we may presume that negotiations were ongoing. To the extent that the shutdown on August 31 was the final episode in what had become an ever-escalating "guerrilla" war waged by the unions to which management responded with sorties of its own, we cannot say that either BART's failure to give the unions advance warning of the shutdown or its institution of new terms and conditions of employment were acts indicating its subjective intent to undermine the collective bargaining process. As the trial court pointed out, BART and the unions continued to bargain during the lockout and did eventually negotiate a con-

tract. Accordingly, we find the trial court did not err in finding that BART had not violated its duty to bargain in good faith under Public Utilities Code section 28850.

The judgment is affirmed.

ROUSE, Acting P.J. WE CONCUR: SMITH, J. BENSON, J.

Footnotes:

1. The exact number of affected workers is not clear from the record. Plaintiffs contend there were some 2,000 members in the two unions.

2. That case eventually led to the opinion of this court in *San Francisco Bay Area Rapid Transit Dist. v. Superior Court* (1979) 97 Cal.App.3d 153.

3. This case does not present the issue of whether the employees conducted an illegal strike. Since it was decided the California Supreme Court had clarified the law on strikes by public employees. (*County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 585.) The Supreme Court had now made it clear that, in this state, public employees have a common law right to strike absent statutory prohibition or a judicial finding that continuance of a particular strike will constitute an imminent threat to public health and safety.

In the case before us the trial court did not reach the question of whether the concerted actions by members of the two unions amounted to a strike.

4. Respondents suggest that at least the members of UPE 390 were barred from asserting this claim because a prior suit by their union on their behalf was dismissed with prejudice. In light of our affirmance of the trial court's denial of recovery on the section 28850 claim, we do not reach the merits of this contention.

[Filed

Mar. 19, 1987

Court of Appeal - First Dist.

Ron D. Barrow, Clerk]

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 2

SOLIS, ROBERT J., ET AL.
vs.
BAY AREA RAPID TRANSIT
DISTRICT, ET AL.
A026629
San Francisco County No. 779391

BY THE COURT:

The petition for rehearing is denied.

Dated: Mar. 19, 1987

ROUSE, J.
Acting P.J.

[Supreme Court

FILED

May 13, 1987]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 2, No. A026629
S000479

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

SOLIS et al.
v.
BAY AREA RAPID TRANSIT et al.

Appellants' petition for review DENIED.

LUCAS
Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

ROBERT J. SOLIS, ET AL.,

Plaintiffs,

v.

BAY AREA RAPID TRANSIT DISTRICT, KEITH BERNARD, individually and in his capacity as General Manager of Bay Area Rapid Transit District,

Defendants.

No. 779391

Announcement of Intended Decision

The court intends to order judgment in favor of the defendants and against the plaintiffs in the above-entitled action. Furthermore, pursuant to 42 U.S.C. 1988, the court intends, in its discretion, not to allow the defendants an award of attorney's fees. They should, however, recover their costs.

Discussion and Factual Determination

This is a class action on behalf of a group of approximately 1500 employees of the defendant San Francisco Bay Area Rapid Transit District (hereafter referred to as "BART"). By orders dated September 30, 1982 and October 25, 1982, Judge Pfotenhauer determined that "the class be comprised of all employees of BART who were employed by BART on August 30, 1979, and who thereafter were unable to work for BART from August 31, 1979 to November 23, 1979." No member of this class has requested to be excluded within the time allowed by the Notice of Pendency of Class Action which was mailed on November 3, 1982. There are letters in the file from attorney Justin Dwinell, dated Janu-

ary 27, 1982, and April 7, 1982, stating that certain employees wished to file their own lawsuit and be excluded from this case. These letters are premature and do not comply with the court rules for requesting exclusion. (See Rule 23, Federal Rules of Civil Procedure, 28 U.S.C.)

This lawsuit, proceeding on the first amended complaint, seeks to recover wages lost by the class members during a period from September 1, 1979 through November 24, 1979. During that period the BART system's normal operations were shut down.

BART is a public agency created by the California Legislature. (Pub.Util.Code, Sections 28500 et seq.) Since 1974, BART's governing body has been "a board of directors consisting of nine members elected by election districts..." (Pub.Util.Code, Sec. 28745). The board of directors is the legislative body of BART and determines questions of District policy. (Pub.Util.Code, Sec. 28762.) The officers of BART include the general manager, who at all relevant times was the defendant Keith Bernard.

The BART Act also provides for determination of collective bargaining units for employees. (Pub.Util.Code, Sec. 28851.) Since 1972, BART has recognized and bargained with United Public Employees Local 390 of the Service Employees International Union, (hereafter referred to as SEIU 390), and Local 1555 of the Amalgamated Transit Union International (ATU 1555). In 1979, Paul Varacalli was the executive director of SEIU 390, and James S. Danzy was the president and business agent of ATU 1555. Union membership is a requisite for employment by BART.

The BART collective bargaining agreement with the two unions expired on June 30, 1979; however, prior to the expiration date, BART and the unions engaged in negotiations which resulted in resolution of many issues. By June 30th, the big issue yet unresolved was the cost of living allowance (COLA). Negotiations continued and the workers continued working under the old collective bargaining agreement. In the meantime, a slow-down by the maintenance workers (SEIU 390) was accelerated, and hostilities surfaced in the face of a BART offer which provided for a different and more austere form of pay increases. Under this offer COLA was not entirely eliminated, but it was drastically modified to bring BART wages in line with other public transit systems, such as the San Francisco Municipal Railway.

At a negotiating meeting on July 8, 1979, the offer was presented to the negotiating team and a recommendation of non-acceptance was made by the union officials. Shortly thereafter, on July 18, the unions were notified that the District was no longer willing to be guided by certain specific provisions of the old agreement, including the discipline of workers. The slow-down grew in intensity with the result that insufficient cars were kept running to deliver necessary service to BART riders.

Acts of senseless vandalism occurred, such as broken car windows, broken switches which caused doors to open suddenly, slashing of air bags at the Concord yard, etc..... all acts that presented a danger to the public as well as a huge expense to BART.

On July 27, 1979, Mr. Varacalli was notified by Larry Williams (negotiator for BART) that BART was transferring maintenance workers out of the Concord yard where most of the slow-down was suspected [and where the air bag slashing had occurred]. [Deleted from decision, 2/15/84.] These workers were replaced with management personnel, all of whom were engineers and instructors and were well-qualified to safely maintain the cars. After this, the situation deteriorated even more, and ultimately the union maintenance workers forceably took over the Concord yard and refused to leave. BART suspended several workers and fired others. The SEIU union filed suit in Contra Costa County seeking an order requiring BART to bargain in good faith, requiring it to bring back the transferred workers, and to reinstate the suspended workers. BART, on the other hand, sought an order to remove the workers from the Concord yard. Superior Court Judge Robert J. Cooney granted the relief requested by the union, and denied BART's request.

However, the Court of Appeal decided that Judge Cooney had acted in excess of his jurisdiction, and accordingly ordered the workers out of the Concord yard. The Court of Appeal further held that Judge Cooney should not have ordered the re-transfer of the maintenance workers back to Concord, and that BART had a right to discipline the workers. (*San Franciso Bay Area Rapid Transit Dist. v. Superior Court*, [1979] 97 Cal.App.3d 153.)

Upon the decision of the Court of Appeal becoming final, the union removed its workers from the Concord yard and the management employees again took over; however, the union offi-

cials began expressing concern about safety, contending that the management employees were not qualified. There was a union demand that there be an inspector in the yard (from the Public Utilities Commission, for example), to certify that the cars were safe. BART did not comply with this request.

On August 29, 1979, Mr. Varacalli appeared on KGO-TV at SEIU 390 headquarters, and stated:

> "We still think that a strike is inevitable. It's just a question of time, and we want to reserve the right to determine when that strike will occur. *We are engaged, if anybody didn't know it by now, in a guerilla warfare activity against BART.*
>
> REPORTER: What does that mean?
>
> VARACALLI: What does that mean?...In effect, we've been on strike for two months. It is a guerilla warfare type of strike. It is unfortunate. *It's making a mess of the transit system.* Uh, BART has been, uh, rather overreactive, if I can say that, to what we do."

Thereafter, on August 30th, the union officials gave orders that the operators were not to take cars in or out of the Concord station. Also, all operators were to refuse overtime requests by management, and were admonished to "drop-sick" when asked to work overtime. On August 31, Mr. Danzy promulgated the following announcement:

> "Dear Brothers and Sisters: The recent illness that has fallen upon the train operators in the Concord yard and upon operators who are dispatched to Concord, is unfortunate and could not be prevented. Such disease will continue to get worse until scabs are removed from the property.
>
> "Any member who replaces a brother or sister that is ill with the BART Flu will be brought up on charges before a trial committee by the Union. I hope that we will stick together during this crisis, and each of you remember that each of us is subject to catching the BART Flu when ordered to the 'Concord Yard.' No member should refuse a direct order, or refuse to take a train, but if you are sick, you cannot be compelled to work.
>
> "I am urging that you also refuse to work any overtime because overtime can also bring on this contagious disease called the 'BART Flu'."

BART Manager, Keith Bernard, determined in the afternoon of August 31st that the system could not be operated in view of the mass drop-sicks. The system was, therefore, closed down.

In spite of the fact that "selective strikes" were planned (without notice to BART), on the first working day after August 31st, the workers were instructed by their unions to report back to work, which most of them did, including gardeners, parking lot attendants, station managers, clerical workers, secretaries, accountants etc. By this time, however, the BART police had taken over all of the facilities, and any employee seeking access to the various BART premises in Concord, Hayward, Fremont and San Francisco was not permitted to go to work.

In October, BART began operating the trains on a very truncated basis, using management operators and maintenance persons. In the offices, temporary employees were hired, and some relatives of management employees were doing replacement work as well. Finally, around November 22, 1979, a new contract was entered into which was basically in the form desired by BART in August.

After the signing of the new contract, the employees made claims for unemployment compensation, which was ultimately granted to most of the applicants.

The Issues

1. The action is not barred by an alleged release.

In view of the court's decision in this case, it is not necessary to address, at length, the question of whether or not the new contract provided for release of all claims against BART. Initially, there was a release of "members, agents, employees" of BART, but this was later deleted. It would seem, therefore, that the November 22nd contract does not bar this action by the employees.

2. Claim by the Employees under Section 28850 of the Public Utilities Code.

Plaintiff employees contend that the lockout was a violation of section 28850 of the Public Utilities Code, the statutory duty to bargain in good faith. In other words, plaintiffs argue that the lockout amounted to the use of an economic weapon during collective bargaining which so interfered with the bargaining process as to warrant finding a refusal to bargain in good faith. They

rely on *San Francisco Bay Area Rapid Transit Dist. v. Superior Court*, supra, 97 Cal.App.3d 153, for the proposition that certain adverse personnel decisions can constitute a violation of section 28850. In that case, the appellate court acknowledged that there were no reported cases interpreting the duty in section 28850 (id. at p. 161) and never decided whether a breach had occurred. It found that that the statutory duty did not provide authority for the trial court's restraining BART in the transfer and discipline of its employees. The union conduct amounted to unprotected activities under federal law, and the employer's response was thus justified. (Id. at p. 163.)

Here the statutory duty is directly in issue, and the court determines that there was no breach. Looking to federal cases, it is true that an employer's unilateral change in conditions of employment under negotiation can be a violation of the National Labor Relations Act, section 8(a)(5) and 8(d) duty to bargain collectively in good faith. (*Labor Board v. Katz*, (1962) 369 U.S. 736.) However, the duty and change of conditions generally refer to meeting and conferring with respect to wages and hours, etc.[1] not to shutdowns following slowdowns. Further, the unions and BART continued to negotiate after the lockout, and eventually entered into a new contract. These facts are inconsistent with a finding of a breach of the duty to bargain in good faith.

3. Plaintiffs' First Amendment Claim under 42 U.S.C. 1983.

Plaintiffs assert that their federal constitutional rights of speech and association were violated by the BART lockout and, under section 1983, they seek a remedy. Section 1983 redresses deprivation of federal rights by state action. BART, as a public agency (Pub.Util. Code, Sections 28500 et seq.) is a state actor, and speech and association are federal constitutional rights properly protected by 1983 actions. (Antieau, Federal Civil Rights Acts, Civil Practice [2d ed. 1980] sections 121, 123.)

But, not *all* speech and conduct are protected by the First Amendment. Constitutional rights are subject to reasonable restraint, and if the union activities here are unprotected, they are not redressible in a 1983 action. (See *Mabey v. Reagan* [9th Cir. 1976] 537 F.2d 1036, 1048-49, citing *Gray* and *Adamian*; *Bullock*

v. Mumford, [D.C. Cir. 1974] 509 F.2d 384, 387.)

(a) *Was plaintiffs' conduct constitutionally protected?*

The evidence showed that plaintiffs were involved in various types of conduct prior to the August 31st shutdown, the most devastating of which was, of course, the so-called BART flu. Mr. Bernard determined — and the court agrees — that the system could not be operated under the circumstances. Looking back from our present-day vantage point, it is, of course, possible that BART could have successfully continued to operate when all of the workers showed up for work on the next working day. However, hind-sight cannot help the plaintiffs at this time. Because of the hostile atmosphere which existed in September of 1979, it is reasonable to conclude that the drop-sick practice would likely reoccur and that selective strikes would be a part of the guerilla warfare which Mr. Varacalli declared a few days earlier. In other words, the lockout was supported by legitimate and substantial business reasons.

(i) *Disruptive Conduct.*

Whether plaintiffs' conduct is protected is a question of law. (*Greminger v. Seaborne*, [8th Cir. 1978] 584 F.2d 275, 278; *Mabey v. Reagan*, [1974] 376 F.Supp. 216, 221 revd. on other grounds in 537 F.2d 1036.) Plaintiffs' membership in a union, and advocacy of wage and benefit provisions are protected activities.[2] (*McLaughlin v. Tilendis* [7th Cir. 1968] 398 F.2d 287; *Greminger v. Seaborne*, supra.) However, refusal to operate cars to the Concord yard or work overtime by dropping sick is the type of premeditated, disruptive behavior that steps outside the protection of the First Amendment. The court does not find that the workers' safety concerns are a credible justification.

In *Bullock v. Mumford* [D.C. Cir. 1974] 509 F.2d 384, Library of Congress employees staged a sit-down strike in the main reading room. The court there held that "[i]f management reasonably believed the [employees'] acts were disruptive, it had a right to order them to vacate the main reading room, and penalize them for refusing to do so, notwithstanding the First Amendment." (pp. 387, 388.)

School First Amendment cases, an analogous situation, are in accord. The court there looks to see whether there was "material and substantial" disruption, and balances the negative facts

to the school against complainants' interest in free expression. (*Mabey v. Reagan*, supra, 537 F.2d at pp. 1049-50, citing *Tinker* and *Pickering*.) Application of this test and the *Bullock* test bring plaintiffs' activities here outside of constitutional protection.

In sum, an employer must not stifle free expression merely because controversial ideas may lead to disharmony (*Mabey*, supra, at p. 1047). However, the First Amendment does not entitle an employee "to try to force his ideas and opinions upon others through harassment or other means." (*Gray v. Union County Intermediate Education District* [9th Cir. 1975] 520 F.2d 803, 807.) Therefore, even if the drop-sicks were a means of expressing a negotiation position to BART, such expression, through its disruption of train service, stepped beyond the reach of the First Amendment's protection.

(ii) *Slowdown and/or Strike.*

Further, the First Amendment does not protect unlawful activities, (*Bullock v. Mumford*, supra, 509 F.2d at p. 387) and the slowdown was unlawful. The California Court of Appeal, looking to National Labor Relations Act cases for guidance, stated

> "...slowdowns...are not protected activities under federal law. '...deliberate "slowdowns" and "walkouts" by the employees to exert pressure on the employer to accept the union's bargaining demands [are] unprotected concerted activities, and the employer [is] free to discharge the participating employees for their unlawful, disloyal tactics'." (*San Francisco Bay Area Rapid Transit Dist. v. Superior Court* [1979] 97 Cal.App.3d 153, 161-62, citing *N.L.R.B. v. Blades Manufacturing Corp.* [8th Cir. 1965] 344 F.2d 998, 1005.)

Mr. Varacalli's announcement notwithstanding, this court need not decide whether the unions' conduct amounted to a strike, since the same result would follow. Government employees do not have the same right to strike in the absence of a statute allowing it (*United Federation of Postal Clerks v. Blount* [1971] 325 F.Supp. 879), and the San Francisco Bay Area Rapid Transit District Act (Pub.Util.Code, Sec. 28500 et seq.) does not provide the right in favor of BART employees.[3]

(b) *If plaintiffs' conduct were protected, was defendants' motive to shut down permissible?*

BART's motive for the lockout is a question of fact: "the only way to erect adequate barriers around First Amendment freedoms is for the trier of fact to delve into the motives of the decision-maker." (*Mabey v. Reagan*, supra, 537 F.2d at p. 1045; see also *Greminger v. Seaborne*, supra, 584 F.2d at p. 278.)

It is impossible to escape the conclusion that the lockout was triggered by the slowdown and the drop-sicks on August 31st. It is likewise impossible to ignore Mr. Varacalli's declaration to the entire world that a state of guerilla warfare was being waged against BART, and that such activity was admittedly making a "mess of the transit system." A situation, therefore, existed where BART could not keep enough cars running to serve the public. Due to this legitimate business necessity, the shutdown of its operations was justified until a new contract appeared on the horizon. Lockouts are not per se unlawful (Labor Law for General Practitioners, Cont.Ed. of the Bar 1960, section 3.83, p. 104) and are in fact lawful if they serve a legitimate business end without intent to discriminate against the union. (*American Ship Building Co. v. N.L.R.B.*, [1965] 380 U.S. 300.) In this regard, the court determines that BART's actions were not for the purpose of discriminating against the unions; nor were they capricious and arbitrary. They likewise were not for the purpose of retaliation.

4. *42 U.S.C. 1983: Due Process Claim*

Plaintiffs argue in their trial brief that an employer violates the Due Process Clause and 42 U.S.C. 1983 when it takes adverse action against its employees in violation of state or local statutes, rules, or regulations governing personnel decisions. Here, plaintiffs continue, defendants' lockout violated BART's duty to bargain in good faith under Section 28850 of the Public Utilities Code, and therefore violated due process.

Since plaintiffs were serving at the pleasure of the general manager, they had no liberty or property interest in their position requiring a constitutional right to notice and a hearing. (*Board of Regents v. Roth* [1972] 408 U.S. 564; c.f. *San Francisco Bay Area Rapid Transit Dist. v. Superior Court*, supra, 97 Cal.App.3d 153, 164.) Notwithstanding the *Roth* rule, an agency must follow its own local rules or regulations regarding personnel decisions to comply with due process. (*Mabey v. Reagan*, supra, at p. 1042.) The cases cited by plaintiffs concern nonrenewal of contracts or

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termination procedures. The present case, of course, deals with a situation where the employees were temporarily locked out. (Plaintiffs cite *Mabey*, supra; *Sherman v. Yakahi*, 549 F.2d 1287; *Burnaman v. Bay City Independent School Dist.*, 445 F.Supp. 927; *Jacobs v. College of William and Mary*, 495 F.Supp. 183.)

Section 28850 does not deal with personnel decisions; it addresses the BART board's duty to bargain in good faith with the "accredited representative" of the labor organization. Plaintiffs have, therefore, not made out a due process violation.

The court is mindful of evidence which showed that many of the plaintiffs did not want to be part of the guerilla warfare which was being waged against BART. It was also clear to the court that many of the plaintiffs had absolutely nothing to do with the illegal and disruptive acts of the two unions and some of the members. These employees were at all times willing to faithfully perform their duties, and it is the court's opinion that they were correctly awarded unemployment benefits. However, because of the potentially dangerous situation with which BART was faced in September of 1979, it was not in a position to make an individual assessment of which employees would be loyal in the future and which ones would create a likelihood of vandalism, selective strikes, slow-downs and other types of "warfare" which would make "a mess of the system." Unlike the cases cited by plaintiffs (*McLaughlin v. Tilendis*, supra, 308 F.2d 287, for example), the present case involves a *temporary* lockout which was clearly privileged because of the already flagrantly illegal acts of the unions. It is to be remembered also that Mr. Danzy proclaimed to the union members that they "would be brought up on charges before a trial committee of the union" if they refused to go along with the epidemic of BART flu. This past conduct, plus the strong possibility that it would accelerate rapidly in the future, supported the necessity for the lockout.

Moreover, though many of the plaintiffs are undoubtedly innocent by-standers (and the court is deeply sympathetic with their plight), it is obvious that their economic loss occurred because of their unions' insistence on demands unacceptable to BART, and not directly because of any unlawful activity by BART. There was no evidence that BART was actuated by malice, or by a desire to discourage membership in the unions, or to discriminate

against union members as such, or to retaliate, or to destroy collective bargaining. The evidence does suggest, however, that there may have been a strong desire on the part of BART to affect the outcome of the stalled negotiations. Thus, aside from the desire to protect its business from loss, the purpose of the lockout may well have been to bring pressure on the unions to modify their demands, which eventually they did. There is nothing in the law which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends a bargaining dispute such as this one. There is likewise nothing in the law which prevents the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position after an impasse has been reached. (Cf. *American Ship Building v. Labor Board*, supra, [1964] 380 U.S. 300, 308 et seq.)

The foregoing shall stand as the court's statement of decision, unless within 10 days, either party makes additional proposals as to the content of the said statement of decision. If additional proposals are received, the attorneys for BART are directed to prepare the same.

In the absence of additional proposals, then the attorney for BART shall prepare an appropriate judgment for presentation to the court for signature.

OLLIE MARIE-VICTORE

Judge of the Superior Court

DATED: December 22, 1983

Footnotes:

(1) National Labor Relations Act, section 8(a)(5), 49 Stat. 452-453, as amended 29 U.S.C., section 158(a)(5) reads, in part:

"It shall be an unfair labor practice for an employer...to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title."

National Labor Relations Act, Section 8(d), added by 61 Stat. 142, 29 U.S.C., Section 158(d) reads:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours,

and other terms and conditions of employment..."

(2) Although plaintiffs' contract had expired before the facts at issue here, and they were therefore serving at the pleasure of the general manager (Pub.Util.Code, Sec. 28811; 97 Cal.App.3d 158, 163), a person's contractual or tenure status is irrelevant to the First Amendment inquiry. (*Perry v. Sindermann* [1972] 408 U.S. 593, 597-98.)

(3) Although the California Supreme Court considers the right of public employees to strike an open question (*El Rancho Unified School Dist. v. National Education Asn.*, 33 Cal.3d 946, 962 (concurring opn. of Justice Grodin)), this court is bound by numerous Court of Appeal decisions denying the right. (4 Witkin, Summary Cal. Law [1982 Supp.] Torts Section 408, p. 191.)

[FILED

San Francisco County Superior Court

Feb. 22, 1984

Donald W. Dickinson, Clerk]

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General Counsel
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Oakland, CA 94607

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

ROBERT J. SOLIS, et al., etc.,
Plaintiffs,

v.

BAY AREA RAPID TRANSIT DISTRICT, et al.,
Defendants.

CASE NO. 779391

JUDGMENT AFTER TRIAL BY COURT

This cause came on regularly for trial on October 17, 1983 in Department 2 of the above-entitled Court, the Honorable Ollie Marie-Victoire, Judge, presiding, sitting without a jury, the jury having been duly waived.

Thomas J. Williams, Esq., Thomas V. Wearing, Esq., Louis A. Highman, Esq., and Beverly M. Lyon, Esq. appeared as attorneys for plaintiffs. James W. Rosenquist, Esq. appeared as at-

torney for defendant. The case was tried on regular court days from October 17, 1983 through October 26, 1983, and evidence, both oral and documentary, was presented by both parties. The cause having been argued and submitted for decision, and the court having mailed and filed herein its Announcement of Intended Decision;

IT IS ORDERED ADJUDGED AND DECREED that:

1. The above-entitled action be and it is hereby dismissed, plaintiffs to take nothing by their complaint; and

2. Defendant is awarded its costs of suit herein in the amount of _____.

Dated: February 21, 1984.

OLLIE MARIE-VICTOIRE
JUDGE OF THE SUPERIOR COURT

Approved as to form:
Thomas V. Wearing
Attorneys for Plaintiffs

42 U.S.C. Section 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I certify that I am over the age of 18 years, a citizen of the United States, a member of the Bar of this Court, and not a party to the within cause. My business address is 870 Market Street, Suite 469, San Francisco, CA 94102. On August 11, 1987, I served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT on the respondent in said cause, by placing three true copies thereof, enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed to respondent BART's counsel as follows:

MALCOLM BARRETT, ESQ.
THOMAS JACKSON, ESQ.
JAMES W. ROSENQUIST, ESQ.
BAY AREA RAPID TRANSIT DISTRICT
Legal Department
800 Madison Street
Oakland, CA 94607

I declare under penalty of perjury that the foregoing is true and correct, and was executed on August 11, 1987, at San Francisco, California.

Louis A. Highman

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-264

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

SOLIS, et al.,
Petitioners,

VS.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

Respondent believes that the following is the issue presented for possible review:

Does the right of freedom of association prevent a local government transit district from temporarily shutting down its transit system and excluding union members from their employment where, during a "guerilla warfare" strike, the transit system's management has concluded that adequate service cannot be provided, that the safety of passengers is at risk and that those conditions were the result of concerted union activity occurring during a labor dispute?

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SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

The respondent, San Francisco Bay Area Rapid Transit District, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the California Court of Appeal's unpublished opinion in this case.

STATEMENT OF THE CASE

Respondent incorporates by reference the facts of the case in the Court of Appeal's opinion as necessary.

In addition, respondent adds the following.

This case arises out of a 1979 labor dispute between respondent, San Francisco Bay Area Rapid Transit District (BART), and two unions, UPE 390 and ATU 1555, which represented the members of the plaintiff class. This dispute led to the ultimate shut down of BART's transit system.

The climate of that labor dispute is well-expressed in the following statement:

> "We still think that a strike is inevitable. It's just a question of when, and we want to reserve the right to determine when that strike will occur. We are engaged, if anybody didn't know it by now, in a guerilla warfare activity against BART. In effect, we've been on strike for two months. [7½ second audio blank; video shows Varacalli speaking] . . . for two months. It is a guerilla warfare type of strike. It is unfortunate. It's making a mess of the transit system. Uh, BART has been, uh, rather overreactive, if I can say that, to what we do." (Def. Ex.K.)

The speaker was Paul Varacalli, the principal representative of UPE 390. (RT 10/25: 153.) The place was a press conference at the union's headquarters. The date was August 29, 1979. (RT 10/25: 217.) Mr. Danzy, President of ATU 1555 attended, as did Mr. Maher, Chairman of UPE 390. (RT 10/21: 606-7.)

The BART system was shut down less than 48 hours later.

In 1976 BART and the two unions had entered into three year contracts, which expired on June 30, 1979. At that time one of the major remaining issues involved the cost-of-living allowance ("COLA"). It was significant because one of BART's negotiating objectives was to reduce (not eliminate) the rate of growth of its employees' wages and thereby, over time, bring wages back into line with the wages paid by other employers in the area. (RT 10/26: 362.) Extensive salary surveys (Def. Ex. Q) revealed that almost every category of BART worker was paid more than comparable workers in the San Francisco Bay Area.

As negotiations proceeded, BART experienced a maintenance slowdown, which manifested itself in a reduction of train cars available for service. The precise methods of the maintenance work slowdown were not documented. However, UPE 390's Chairman, Mr. Maher, admitted that his members had been instructed to go by the book, i.e. to consult maintenance manuals prior to doing work. (RT 10/21: 593.) Repetitive work was now checked in the manual. (RT 10/25: 241.)

When the contracts expired, union members stayed on the job, the sides continued to bargain, and the contracts remained in effect on a day-to-day basis. However, the "car-count" of available train cars continued to decline.

In this context, BART made its "final" offer on July 8, 1979, which was rejected by the unions three days later, July 11, 1979. On that date the transit-riding public was again a casualty of the guerilla war when BART's trains stopped running entirely for twenty minutes while certain members of UPE 390 left their posts to attend the union meeting. (RT 10/19: 297; 10/25: 259.) The upshot of the meeting was not only a rejection of BART's final offer but also a threat to strike. (Pl.Ex. 27.)

As a result of a continued deterioration of the car-count, in early July, BART modified its position on continuing the expired contracts in effect, and certain provisions of these contracts were modified. Thus, on July 19, 1979, BART agreed only to be "guided by" the old agreements and specified that grievance procedures in the expired contracts were not in effect. (Def. Ex. H.)

There was some improvement in the car count beginning about July 18, 1979, and for several days it appeared that the situation had stabilized. However, although daily maintenance production had returned to normal, something more than routine work-effort was required to eliminate the backlog of cars needing maintenance. As a result of this backlog, and the unwillingness of the union workers to address it successfully, BART decided on July 27, 1979, to temporarily reassign certain maintenance workers from its Concord repair shop. Those reassigned workers were to be sent to two other maintenance shops to augment the forces working there. The Concord shop would be staffed by non-union supervisory personnel. (RT 10/17:53; Pl.Ex. 8.)

The insurgents' response to this was to take over BART's Concord shop on the night of July 28/29. BART's supervisory personnel were forceably evicted. (RT 10/25: 230-240.)

Ironically, after taking over the premises of the Concord shop, UPE 390's lawyers went to court to seek a writ of mandate, filing an action in the Contra Costa County Superior Court. (Def.Ex.

F.) On August 3, 1979, the Contra Costa County Superior Court issued an order which, in part, required the union members to cease their occupation at Concord and prohibited BART from transferring the union members out of Concord as planned on July 27, 1979. (Pl.Ex. 20.) BART appealed and was ultimately vindicated, when the Court of Appeal overruled the Superior Court and confirmed that BART had the right, while no contract was in force, to deal with its workforce. *San Francisco Bay Area Rapid Transit District v. Superior Court*, 97 Cal.App.3d 153, 158 Cal.Rptr 627 (1979).

Although BART once again controlled the premises of its Concord shop after the order, there was continued unrest and the car count did not improve. Although the previous hostile forays had principally involved the members of UPE 390, the other union, ATU 1555, through its president, had been involved in the Concord shop sit-in. On August 11, ATU 1555 went on record with a threat of selective strikes. (Pl.Ex. 18.)

BART continued to try to resolve the impass between the parties. On August 14, 1979, it presented to the unions two variations on the so-called final offer. (Exhibit V.) There were additional formal negotiations (Def.Ex. R), as well as behind the scenes informal discussions. (RT 10/17: 58.)

With a collective bargaining agreement in a state of limbo, BART wanted its employees to know the rules which were applicable to their employment. (RT 10/17: 70.) Thus, on August 20, 1979, BART issued the so-called Interim Terms and Conditions of Employment (Exhibit 13.) These conditions varied from the expired collective bargaining agreements, and the modifications were designed to discourage selective strikes as well as to increase maintenance production through overtime and thereby improve the car-count problem. (RT 10/17: 72-4.) The interim terms were issued unilaterally by BART, and, of course, the unions could never agree to them. For example, Mr. Maher testified that his union never followed the complaint procedures set forth in the Interim Terms and Conditions. (RT 10/21: 599.)

Negotiations, however, continued. A group of union leaders was brought in to provide assistance. (RT 10/17: 68.) A joint

union bulletin indicated that, as of August 27, 1979, a strike was imminent, and members of the unions were instructed to refuse to work overtime. (Pl.Ex.31.)

There were also incidents of sabotage. (RT 10/20: 469-73). BART knew at all times, and during trial acknowledged, that the vast number of its employees were blameless in the insurgency being waged against BART and the transit-riding public. Certainly BART has never contended that any more than a handful of its employees were responsible for the deliberate destruction of property which occurred between August 27 and 29, 1979, when eighty airbag suspension systems, on thirty-four train cars were slashed at Concord. (Def.Ex. 32.)

The airbag slashing incident resulted in an immediate suspension of the union workers at Concord. (RT 10/20: 464.) At the same time, BART started to demand overtime work from its maintenance workers, since the car-count still remained low and productivity had not increased. The workers' refusals to work overtime resulted in disciplinary suspensions. The suspensions ordered by BART management were planned out and scheduled in a way to attempt to avoid additional disruption to maintenance efforts. (RT 10/17: 66; Pl.Ex. 15.) However, the suspensions at Concord made that facility useless for maintenance. Accordingly, BART management planned to install supervisors to inspect and then repair the trains at Concord. (RT 10/17: 88-9.)

August 31, 1979 was ATU 1555's day to carry the burden of disruption. Train operators refused to work, but utilized the subterfuge of "dropping-sick." Supervisors' reports show the numbers were in excess of thirty-five. (Def.Exs. M and N.) "BART flu" was the culprit, and a union memo of that day (Pl.Ex. 22) makes it crystal clear that the union was spreading the disease.

The BART system was shut down on the evening of August 31, 1979. Mr. Bernard, BART's General Manager, made the decision. Several reasons led to his conclusion. First, because of train operators dropping sick in Concord, BART could not run enough trains to provide an adequate service. (RT 10/27: 317-9.) Safety was a second concern, given overcrowding of trains and incidents

of sabotage or tampering which had been reported to him. (RT 10/27: 319-20.) Also, Mr. Bernard was convinced that the events of August 31, 1979 were a further demonstration of the concerted action being waged against BART.

The next day, September 1, 1979, Mr. Demko, BART's maintenance manager, impounded the fleet of transit vehicles. This was done so that every car could be checked and a determination be made as to the integrity of the equipment. (RT 10/20: 475.)

Although the unions claimed that their members were ready to go back to work, the unions' proposal of September 7, 1979, was to return to work provided that the old contracts were put back in to force. This was rejected. Later, after the status of the transit vehicle fleet had been stabilized, BART offered the unions the opportunity to bring their members back to work with the return of individual workers to be phased-in as the operation of the system was begun. ATU 1555 rejected this offer, (Def.Ex. Y.) but the record is silent with respect to any response from UPE 390.

An agreement was finally reached on new collective bargaining agreements shortly before the Thanksgiving holiday, and the union employees returned to work on November 23, 1979.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Decision Below Gave Full Consideration To The Issues And Decided Them Correctly

The California Court of Appeal, in affirming the trial court's opinion, applied the correct standard of review in this case. The Court relied on *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731 (1968) and its progeny, *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), reaffirmed in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 99 S.Ct. 693 (1979), and found that respondent did not offend petitioners' First Amendment rights by temporarily shutting down its transit system and not allowing Petitioners to work for approximately three months. (Court of Appeal Decision, Section I, A-5-A-6.)

In determining public employees' rights under the First Amendment a balance must be struck between the interests of the employees in their expressive activity and the interest of the employer in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734 (1969).

There is no doubt the Court of Appeal, in reviewing the facts of this case, struck the correct balance in favor of respondent employer. The court detailed the circumstances which led to the decision to shut down the transit system: the slow-down in car maintenance, the take-over and occupation of the Concord shop for five days by employees; the damage to tools and vehicles, the proclamation by a union representative that a "guerilla war" was being waged; and employees "dropping sick". (Court of Appeal Decision, Facts and Procedural History A1-A4.) The Court of Appeal found that:

> "Membership in the two unions had indeed come to threaten the efficient operation of BART on August 31. ATU 1555 prepared a bulletin dated August 31 which threatened that any member who replaced a member who had dropped sick would be subject to union charges. A similar call for "discipline" in the face of management calls for overtime was made on behalf of both unions on August 27. After the president of ATU 1555 was told on August 31 at about 5:15 p.m. that there would be a management press conference, station agents throughout downtown San Francico dropped sick. In order to retain their jobs the employees had to belong to the union. Yet the union was now threatening discipline if the employees complied with management requests for overtime or reassignment. Under the Interim Terms and Conditions of Employment adopted unilaterally by BART on August 20, acceptance of overtime was mandatory. Members of these unions were in the untenable situation of being subject to union discipline if they did work and employer discipline if they did not. Their union membership imposed demands upon them which, directly affected the efficient operation of the transit system." (Court of Appeal Decision, Section I, A-6.)

The Court of Appeal rejected the notion that the decision to temporarily refuse to allow the employees to work was motivated by anti-union animus. (Court of Appeal Decision, Section I, A-7.) The Court in striking the correct balance held:

> "[O]n the facts of this case where such a situation pertained, *and* where there was a serious threat to the continued safe operation of a mass transit system whose thousands of passengers might otherwise be stranded or endangered while traveling through the Transbay tube or the East Bay Tunnel or on some elevated portion of the system, that the potential hazards to the public outweighed the injury suffered by the members of the unions for the period of the lock-out."(Emphasis in original.) (Court of Appeal Decision, Section I, A-8.)

The Court of Appeal decision is consistent with another progeny of *Pickering* decided by this Court. In *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684 (1983), this Court held that the *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. *Id.* at 151, 103 S.Ct. at 1692.

> "To this end, the Govenment, as an employer must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." (*Id.*, citing *Arnett v. Kennedy,* 416 U.S. 134, 168, 94 S.Ct. 1633, 1651 (1974).

The Court of Appeal correctly concluded that First Amendment rights were not violated under the facts of this case and the opinion presents no conflict with decisions of this Court.

2. A Review By This Court Would Involve Only Questions Of Fact

The questions petitioners raise in their Petition turn on the particular facts of this case alone and are of interest only to the parties to it.

Petitioners take the position that the Court of Appeal applied an incorrect framework of analysis in determining petitioners' First Amendment rights and argue that the Court should have based its analysis on *United States v. Robel,* 389 U.S. 258, 88 S.Ct. 419 (1967), and similar cases, prohibiting "guilt by association." (Petition, page 19.) Petitioners' position is entirely premised on an incorrect interpretation of the trial record. That faulty premise reduces this case simply to one in which the employer is characterized as refusing to allow employees to work *solely* because of their union membership. This incorrect view was rejected by both the trial court and the Court of Appeal.

In effect, petitioners ask this Court to make a third review of the lengthy trial record and find what two lower courts were unable to find—a claim for relief based on the First Amendment to the United States Constitution under 42 U.S.C. Section 1983. This Court should deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts of a case already resolved twice in favor of respondent. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

Further, since this is essentially a factual case, a further review shall have no impact outside the limits of this case. Assuming for purposes of argument that an interesting or even novel principle of law might evolve from a review, it would be limited to the peculiar facts of this case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Dated: October 9, 1987

Respectfully submitted,

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